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No. 09-745

In The

Supreme Court of the United States

DENNIS ANDREWS, TIM KAUFMANN, SAUL WEINSTEIN, NOBERTO BERCASIO, FRED COFFEY, EVAN FERMAINT, RONALD PROHASKA AND EDWARD BYRNE,
Petitioners,

v.

ROGER FAIRLEY AND RICHARD GACKOWSKI,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the doctrine of Prior Restraint makes actionable harassment or physical "threats of punishment" alleged to have been made to "discourage future speech."

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

The petitioners here are Dennis Andrews, Tim Kaufmann, Saul Weinstein, Noberto Bercasio. Fred Coffey, Evan Fermaint, Ronald Prohaska and Edward Byrne. Each was an appellee below.

The respondents here and appellants below are Roger Fairley and Richard Gackowski.

The following parties were defendants in the district court action but did not participate in the appeal to the United States Court of Appeals for the Seventh Circuit: Patrick Loizon, Gregory Ernst, Gabriel Ochoa, Juan Diaz, Michael Sheahan, and Cook County.

The Sheriff of Cook County, Thomas Dart, was an appellee below, but is not a petitioner.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 578 F.3d 518 (7th Cir. 2009). App., *infra*, 1a-16a.

JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. § 1331. The court of appeals held that it had jurisdiction to review the district court's order under 28 U.S.C. § 1291. (578 F.3d at 522) The court of appeals' judgment was entered on August 20, 2009. A timely petition for rehearing was filed on September 3, 2009. (App., *infra*, 50a) The petition was denied on September 21, 2009. (*Id.*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Respondents, Roger Fairley and Richard Gackowski, two former correctional officers at the Cook County (Illinois) Department of Corrections, claim that they were "compelled" to quit their jobs due to on-the-job harassment they say was directed at (1) preventing them from reporting to their superiors officer-on-inmate abuses they claim to have witnessed; and (2) "discouraging" their future testimony in a lawsuit that had been brought by present and former inmates against various of their fellow officers.

Petitioners have denied the allegations and contested their veracity at every stage of the litigation. After a series of pre-trial rulings that they believed adverse to their case, Respondents requested that summary judgment be entered against them. The appeal underlying this Petition followed, resulting in the reversal of the district court's judgment order "[t]o the extent that it dismissed the [plainitffs'] prior-restraint claim." 578 F.3d at 526.

I. Factual Background

Plaintiffs, Roger Fairley and Richard Gackowski, were formerly employed as correctional officers at the

Cook County Department of Corrections. (R. 447-1)[1] Each of the Defendants were also employed in various capacities at the Cook County Department of Corrections. (R. 257)

Fairley and Gackowski both allege that they were harassed, teased and physically assaulted while at work by Petitioners Bercasio and Fermaint, two of their fellow correctional officers. (*Id.*) Fairley alleges that another of his former fellow correctional officers, Petitioner Coffey, threatened "to beat him up" in "late 1998 or early 1999" and "warned" him in "October or November 2002 . . . that officers who tell on other officers 'usually get met in the parking lot.'" (*Id.* at ¶49) Fairley further alleges that Petitioner Byrne denied him paternity leave and overtime pay and ignored a request for back up. (*Id.* at ¶¶ 43, 50) and that Petitioner Andrews, the Superintendent of the Division, "failed to ensure [his] assignments were being rotated properly." (*Id.* at ¶¶ 39, 43) Gackowski alleges that Andrews "threatened to sue him for slander" (*Id.* at ¶ 56) and that Defendant Weinstein "stalled [an] investigation" into his internal complaints. (*Id.* at ¶ 57)

Both Fairley and Gackowski ascribe the motive for the complained of actions as their having been witness to officer-on-inmate violence, and their subsequent willingness to testify in favor of certain inmate-plaintiffs in a civil lawsuit, *Fields v. Byrne,* No. 00 L 9339 (Cir. Ct. Cook County filed Aug. 16, 2000) (hereafter "*Fields*"). (*Id.* at ¶¶ 37-51 52-62)

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[1] Reference to "R." is to the number assigned by the clerk on the civil docket.

The *Fields* case arose from an altercation between correctional officers and inmates in a section of the jail known as "Special Incarceration Unit 2," or "SI-2." (*Id.* at ¶ 28) The resulting lawsuit named Petitioners Fermaint, Bercasio and Byrne as defendants, together with the Executive Director of the jail, the then-Superintendent of the Division housing "SI-2," a Correctional Captain, two Correctional Sergeants, and twelve other correctional officers – none of whom are parties to this suit. (*Id.* at ¶ 34).

In December 2002 Fairley received a subpoena to testify in the *Fields* case. Later that month, Fairley claims an inmate attacked him with a shank, cutting him on the wrist. He theorizes that one or more of the defendants to the suit provoked the inmate to attack him. (R. 553-1) The States Attorney's Office never brought criminal charges against the inmate for his assault on Fairley. (R. 447-1) Fairley claims that Bercasio later remarked: "You see that, Fairley? You **** with people, that's how you get stabbed." (578 F.3d at 520)

Prior to Fairley's subpoenaed deposition, Gackowski testified that Petitioner Prohaska threatened both he and Fairley, saying, "[I]f Fairley goes into court on this SI-2 case ... and tells the truth, he will **** everyone involved.... We always knew he was a weak link and when a weak link can **** everyone in the chain, then we have to bury the weak link. It's nothing personal. It's just business.... Just like with your complaint trying to **** fellow officers." (578 F.3d at 521)

On January 9, 2003, Gackowski submitted a written complaint to IAD concerning Prohaska's

alleged threat. (R. 257 at ¶ 61) On January 10, 2003, Gackowski was offered a transfer anywhere on the jail compound. (R. 553-1) Gackowski declined the transfer offer and informed IAD investigators that he was leaving the CCDOC. (*Id.*)

Fairley last worked a shift at the CCDOC in January 2003, prior to his subpoenaed deposition. (R. 553-1) Gackowski worked his last shift in January 2003, as well. (*Id.*) Both Fairley and Gackowski then used all of their vacation and sick days and tendered their resignations after that time was exhausted on February 3, 2003. (*Id.*)

Gackowski sat for a deposition in the *Fields* case after his resignation from the CCDOC. (R. 448) Plaintiffs concede that none of the Petitioners – nor anyone else associated with the Cook County Department of Corrections – did anything to prevent either of them from testifying on their appointed days. (R. 447-1)

On July 25, 2003, Fairley and Gackowski filed the underlying lawsuit. (R. 1)

The *Fields* case was tried before a jury in May and June of 2005. (R. 420) Both Fairley and Gackowski testified for the plaintiffs. (R. 462-1, R. 465-1) The jury returned a verdict in favor of all of the defendant correctional officers, including Fermaint, Bercasio and Byrne, after deliberating for less than one hour. (R. 420)

II. Proceedings Below

After the close of discovery, but before trial, the district court issued a number of rulings on the parties' motions *in limine*. Plaintiffs sought reconsideration of one of the rulings, or in the alternative for a stay of the trial and a certification of the question to the Seventh Circuit Court of Appeals. The motion was denied. (App., *infra,* 19a -44a) Plaintiffs then filed a pleading that requested the district court enter summary judgment against them in order to pursue an appeal (R.1011-1). The district court granted the motion and entered judgment in favor of the defendants. (R.1014-1).

On appeal, the Seventh Circuit construed the judgment order as a "consent judgment" and held that it had jurisdiction to consider the merits of the appeal. (578 F.3d at 522)

The panel held that *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), served to bar the plaintiffs' cause of action insofar as it was based on intra-jail reporting, but found that, to the extent the claims were based on an alleged effort to prevent the plaintiffs' future testimony in the *Fields* case, that the plaintiffs could "recover from any defendants" who made "threats of punishment . . . designed to discourage future speech." 578 F.3d at 525.

The panel imposed two "additional requirements": First, "Plaintiffs must show that their potential testimony, not their internal complaints, caused the assaults and threats." 578 F.3d at 525. "This," according to the panel, "means but-for causation." *Id.*

(citing *Gross v. FBL Financial Services, Inc.*, --- U.S. ----, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009); *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). Second, the panel required "proof of damages" be shown. The panel posited the "largest item" of damages "will be lost income, if plaintiffs can establish that the threats caused them to quit." 578 F.3d at 526. But held that "[l]esser threats, defamation, and battery . . . also can lead to damages, if these are the sort of harms that would cause a reasonable person to keep quiet." *Id.*

Petitioners filed a Motion for Rehearing and Rehearing *En Banc*. The Motion was denied. (App., *infra*, 50a)

REASONS FOR GRANTING THE PETITION

By way of an expansive reading of the doctrine of "Prior Restraint," the Seventh Circuit opinion at issue effectively transforms the most basic of juvenile, schoolyard threats -- "if you tell on me, I'll beat you up" – into a *prima facie* federal cause of action. The only allegation necessary to achieve a trial on the merits in federal court – other than the allegation of the "threat" itself – is that the "threat" involve state or federal employees rather than schoolchildren.

The panel decision imports the doctrine of "prior restraint" into the area of public employment law in an unprecedented manner and impermissibly expands the reach of a doctrine that this Court has, heretofore, expressly confined to state actions that rise to a "legal impediment . . . to . . . expressive activity." See *Alexander v. United States*, 509 U.S. 544, 551, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). The opinion

promises to – quite literally – make a federal case (by the legion) out of what would otherwise be run-of-the-mill workplace frictions between public employees that should, in practice, be resolved within the workplace instead of federal court.

The opinion makes actionable any on-the-job statement or act alleged to have been "designed to discourage future speech." 578 F.3d at 525. Further, under the construction adopted by the panel, the offending statement or act is actionable without regard to whether it *actually* discouraged or prevented whatever "future speech" may be at issue. Instead, the test is objective, permitting the award of damages if it is determined that the offending statement or act "would cause a reasonable person to keep quiet." *Id.*

To equate an allegation of harassment or a physical "threat of punishment" made on the job between two state employees with administrative censorship, an injunction, or a gag order for purposes of the doctrine of prior restraint is to trivialize the First Amendment. It would, too, serve to lower the bar of justiciability beyond the threshold required by Article III.

To permit – as the decision at issue does – everyday workplace frictions to be re-cast as federal lawsuits couched in the First Amendment promises both to diminish the import of the First Amendment and inundate the federal court system.

I. THE DOCTRINE OF PRIOR RESTRAINT DOES NOT MAKE ACTIONABLE, UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, HARASSMENT OR PHYSICAL "THREATS OF PUNISHMENT"

"Prior restraint" has traditionally described "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech*, §4.03, p. 4-14 (1984). "Temporary restraining orders and permanent injunctions – *i.e.*, court orders that actually forbid speech activities -- are classic examples of prior restraints." *Alexander*, 509 U.S. at 550.

In *Alexander*, the United States Supreme Court held that a court order for forfeiture of assets – issued as punishment for violations of the Racketeering Influenced and Corrupt Organizations Act – did not qualify as a prior restraint because "it does not forbid petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities." *Alexander*, 509 U.S. at 550-51. The Court concluded that "[u]nlike [an] injunction[] . . . the forfeiture order in this case imposes no legal impediment to – no prior restraint on – petitioner's ability to engage in any expressive activity he chooses." *Id.*

In setting out the history of the prior restraint doctrine, the Court noted that it "expanded this doctrine to include not only licensing schemes requiring speech to be submitted to an administrative

censor for prepublication review, but also injunctions against future speech issued by judges." *Alexander*, 550 U.S. at 553, n. 2. "Quite obviously, however, we have never before countenanced the essentially limitless expansion of the term that petitioner proposes." *Id.*

More recently, the Court expressly refused to expand the doctrine of "prior restraint" to encompass public libraries' collection decisions. See *United States v. American Library Assn., Inc.*, 539 U.S. 194, 209 n. 4 (2003) (rejecting Justice Stevens's argument, in dissent, that would have "mistakenly extend[ed] prior restraint doctrine to the context of public libraries' collection decisions")

The panel's decision below – treating workplace harassment as a potential "prior restraint" – would lead to an unprecedented and "essentially limitless expansion" of the prior restraint doctrine far beyond that disapproved in *Alexander*.

Here, for sake of example, the sum and substance of the claim against one of the Petitioners, former correctional officer Fred Coffey, is that he threatened "to beat up" Fairley in "late 1998 or early 1999" and, on a separate occasion at least three years later "warned Plaintiff Fairley . . . that officers who tell on other officers 'usually get met in the parking lot." (R. 257-12) Fairley did not report the alleged "threats" (which Coffey denies making in the first instance) to his superiors or seek to resolve his issue with Coffey otherwise (through his union, for example). He instead quit his job and sued Coffey for a "violation" of his putative First Amendment rights for allegedly "discouraging" him from later testifying in a pending

lawsuit – a lawsuit to which neither Fairley nor Coffey was a party.

Under the panel's decision, Fairley's claim against Coffey is actionable despite the fact that the alleged "threats" were both unfulfilled and did nothing, in reality, to discourage Fairley's eventual testimony – Fairley having admitted that neither Coffey (nor any of the other defendants), did anything to prevent him from testifying at any of the sessions he submitted to depositions in the *Fields* case, or at trial.

The "threats," used in the context of prior restraint jurisprudence, have been – heretofore – confined to "threats" that a regulation, law or decree would be enforced. In *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556 (1947), for example, the Court analyzed the effect of the Hatch Act on federal employees' First Amendment rights. Considering, in the first instance, whether the underlying suit was actionable, the Court analyzed whether there had been a justiciable injury, setting out a continuum ranging between a "general threat by officials to enforce those laws which they are charged to administer" and a "direct threat of punishment against a named party for a completed act." *Mitchell*, 330 U.S. at 88. The Court held only an action alleging the latter satisfied the "case or controversy" requirement of Article III and that "a general threat of possible interference with [First Amendment] rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy." *Mitchell*, 330 U.S. at 89. See also *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), ("credible threat" of criminal prosecution under statute

at issue satisfied case or controversy requirement of Article III).

Until now, every actionable prior restraint has presented some legal impediment to speech before it occurred – and presented a circumstance by which speaking in the face of the legal impediment subjected the speaker to some type of penalty, most commonly a fine or arrest. See Emerson, Thomas *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROBS. 648, 648 (1955).

The Court has never had cause to consider *physical* threats in a public workplace as a *de facto* prior restraint actionable under the United States Constitution. And the extension approved by the Seventh Circuit in the opinion at issue carries with it the very real prospect of inundating the courts here with new First Amendment-related employment litigation.

Hundreds of lawsuits are filed by inmates and detainees at the Cook County jail annually. Many hundreds are also disposed of at various stages, as well, but at any given time, dozens upon dozens of Cook County correctional officers are named defendants in one or more pending state and federal civil cases. Dozens upon dozens more are witnesses (or potential witnesses) to the various claims. (In the *Fields* case at issue here the plaintiffs named -- as party defendants -- nearly 40% of the jail's correctional staff on duty in the division at the time of the incident). Very nearly any correctional officer could attempt to attribute a fellow correctional officer's action or inaction as having been motivated by an attempt to influence potential testimony in one of the

hundreds of pending suits. And under the Seventh Circuit's formulation of "prior restraint," that action or inaction would itself become the basis for yet another lawsuit if it could be claimed that such action or inaction would "cause a reasonable person to keep quiet."

The Seventh Circuit's extension of the doctrine of prior restraint is unprecedented and should not be permitted to stand.

CONCLUSION

For all the reasons set forth herein, the Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-3343

[Filed August 20, 2009]

ROGER FAIRLEY AND RICHARD GACKOWSKI, *Plaintiffs-Appellants*,

v.

DENNIS ANDREWS, et al., *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 03 C 5207—**Amy J. St. Eve**, *Judge*.

ARGUED MAY 6, 2009—DECIDED AUGUST 20, 2009

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Roger Fairley and Richard Gackowski worked as guards at the Cook County Jail in Chicago. After their peers threatened to

kill them, they quit and sued the other guards, complaint handlers, the sheriff, and the County. (In saying that death threats were made, and throughout the opinion, we present the evidence in the light most favorable to plaintiffs. Defendants deny many of plaintiffs' principal contentions.)

Guards at the Jail regularly beat prisoners without justification. The harm plaintiffs complain of, however, is not the injuries suffered by prisoners but how other guards reacted when plaintiffs opposed the maltreatment. For example, in April 2000 Gackowski objected when Fred Coffey struck inmate Brown. Gackowski followed up with an internal complaint. Coffey and other guards responded by taunting Gackowski, calling him a "snitch" who "had no heart."

Four months later a fight broke out in Special Incarceration Unit 2, which holds the Jail's most dangerous inmates. After the prisoners had been subdued and shackled, guards Evan Fermaint, Noberto Bercasio, and Edward Byrne beat them. Fairley told them to stop. Byrne snapped: "They want to hurt my officers. . . . [K]ill 'em. They deserve to die." Byrne later told Gackowski (who had not seen the altercation) that he had twisted and jumped on an inmate's leg but couldn't get the bones to break. Byrne told Fairley not to file an incident report. Bercasio and Fermaint tagged Fairley "inmate lover."

Though the Department of Corrections' General Orders require guards to report any misconduct by their peers, plaintiffs say that this does not reflect reality; according to them, the Jail's real rule is a ban on reporting misconduct—a "code of silence." At the training academy, instructors told cadets to stick

together and "don't say any bad remarks about anybody." This attitude pervaded the Jail.

Tensions mounted when the inmates involved in the incident in Special Incarceration Unit 2 filed suit. *Fields v. Byrne*, No. 00 I. 9339 (Cir. Ct. Cook County filed Aug. 16, 2000). Fairley and Gackowski told other guards that, if subpoenaed, they would tell the truth about what they had seen and heard. Fields's lawyer sent an investigator to Fairley's home, but Fairley said he hadn't seen anything. Fairley informed his superiors about the visit. They obtained a court order restricting Fields's access to guards and told the guards not to talk to anyone about what happened.

Plaintiffs' willingness to testify in *Fields* infuriated the other guards. Bercasio and Fermaint forcefully "dry humped" plaintiffs by grabbing them from behind and simulating anal intercourse. Bercasio posted on the Jail's bulletin boards pornographic cartoons featuring Gackowski. Supervisors repeatedly assigned plaintiffs to Special Incarceration Unit 2 without adequate supplies; other guards refused to let them out to use the restroom. Byrne denied Fairley's request for paternity leave and refused to pay plaintiffs for overtime they had worked. The taunts "inmate lover" and "social worker" flew freely.

Gackowski submitted an internal-affairs complaint about the bullying in August 2002, two years after *Fields* was filed. In December Fields served a subpoena on Fairley. Later that month inmate Lipscomb attacked Fairley with a shank, cutting him on the wrist. Bercasio remarked: "You see that, Fairley? You fuck with people, that's how you get stabbed." (Plaintiffs do not allege that guards

furnished Lipscomb with the shank.) Internal investigators dragged their heels. Ronald Prohaska told Gackowski, "[I]f Fairley goes into court on this SI-2 case . . . and tells the truth, he will fuck everyone involved. . . . We always knew he was a weak link and when a weak link can fuck everyone in the chain, then we have to bury the weak link. It's nothing personal. It's just business. . . . Just like with your complaint trying to fuck fellow officers."

Fearing further attacks, plaintiffs used all accrued leave time and then quit on February 4, 2003. Fairley had given his deposition in *Fields* a few weeks earlier; Gackowski was deposed in mid-February. Both testified at trial. The jury returned a defense verdict.

Fairley and Gackowski seek relief under 42 U.S.C. §1983. They contend that defendants violated their speech rights by assaulting and threatening them for reporting abuse to Jail supervisors and for their willingness to testify truthfully in *Fields*. They also contend some of the defendants violated their rights by preventing their complaints from moving up the chain of command.

Before reaching the merits we must address appellate jurisdiction. Shortly before trial was to begin, the court granted a motion to exclude all evidence of events that took place before Fairley and Gackowski gave their depositions. 2007 U.S. Dist. LEXIS 70539 (N.D. Ill. Sept. 24, 2007) (denying plaintiffs' motion for reconsideration). Plaintiffs call their theory "retaliation"—we'll consider later whether that's a helpful word—and the district judge believed that "retaliation" must follow protected speech. Because effects can't precede their causes, everything

before the depositions must be irrelevant. (The district judge had already dismissed the claim alleging punishment for filing internal complaints.) Plaintiffs contested this decision but acknowledged that, given the ruling, they could not prove their case, since the assaults and threats all occurred before the depositions. The judge responded: "[I]f you are still saying that you concede that you cannot prove causation in your case based on the Court's rulings, then I will grant judgment for the defendants on that issue, and you can take it all up to the Seventh Circuit."

Oddly, the court's docket entry states that plaintiffs' response to defendants' motion for summary judgment "is converted to a motion by Plaintiff [to] dismiss." (A docket entry is an improper substitute for a judgment. Fed. R. Civ. P. 58 requires a document separate from the statement of reasons supporting the relief granted in the judgment.) Defendants seize on this language, arguing that it shows that the court dismissed the case pursuant to Fed. R. Civ. P. 41(a)(1) (voluntary dismissal by the plaintiff). And defendants read cases such as *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), to bar appeals from actions terminated under Rule 41(a)(1).

Defendants are mistaken. The only prerequisites to appellate jurisdiction are a final judgment and a timely notice of appeal. 28 U.S.C. §1291. Whether a party consented to that judgment (and which particular rule of civil procedure the district court invoked) is irrelevant. *McMillian v. Sheraton Chicago Hotel & Towers*, 567 F.3d 839 (7th Cir. 2009); *Downey v. State Farm Fire & Casualty Co.*, 266 F.3d 675 (7th

Cir. 2001). The judgment here is final and the notice timely, so we have jurisdiction.

That said, if plaintiffs consented to the entry of judgment against them, we must affirm. Litigants aren't aggrieved when the judge does what they want. *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261 (1885). Plaintiffs contend that they accepted dismissal as inevitable only after the district court gutted their case. This matches the district judge's description. Cf. *Katz v. Gerardi*, 552 F.3d 558, 563 (7th Cir. 2009). Acknowledging that a case is hopeless, given a prior ruling (which the party believes to be unsound), is a far cry from abandoning the suit. *McMillian* and *Downey* hold that a party who asks for a final judgment in order to appeal an antecedent ruling is entitled to contest the merits of that issue on appeal. *Chavez* illustrates this principle. After the district court dismissed some of plaintiffs' claims, they requested the entry of judgment against them. We reviewed claims rejected by the court but refused to consider claims that were still live when plaintiffs asked for judgment. The rule is simple: if plaintiff loses on A and abandons B in order to make the judgment final and thus obtain immediate review, the court will consider A, but B is lost forever. See also *Pollution Control Industries of America, Inc. v. Van Gundy*, 979 F.2d 1271 (7th Cir. 1992).

On to the merits. Fairley and Gackowski present two theories of recovery under the first amendment: first, that defendants punished them for defying the code of silence by reporting fellow guards' misconduct; second, that defendants bullied them to keep them from testifying in *Fields*.

Garcetti v. Ceballos, 547 U.S. 410 (2006), holds that the first amendment does not protect statements made as part of one's job. Ceballos, a deputy district attorney, discovered what he believed were material misrepresentations in an affidavit that had been used to support a search warrant. He wrote a memo to his superior suggesting that the case be dismissed. When the supervisor disagreed, Ceballos pressed his view. The supervisor responded by transferring Ceballos to another office and refusing to promote him; Ceballos sued. The ninth circuit concluded that the first amendment applies to speech that is part of a worker's responsibilities. *Ceballos v. Garcetti*, 361 F.3d 1168, 1174–75 (9th Cir. 2004). The Justices reversed, holding that the first amendment does not regulate the way in which a public employee's job is performed. The Constitution does not restrict a public employer's ability to manage the workplace, whether the bureaucracy's tasks entail speech or action.

The Jail's General Orders thus pose a problem for plaintiffs' first theory. Since the General Orders require guards to report misconduct by their colleagues, the guards' reports are not part of the freedom of speech— and how the sheriff responds is a question for statutes, regulations, and wise management rather than the Constitution. Ceballos reported that his co-workers had likely broken the law; his superior thought that the memo displayed bad judgment and acted accordingly. See also *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007). So here, plaintiffs reported what they deemed illegal conduct by co-workers, and that speech is not protected.

Plaintiffs try to avoid *Garcetti* by arguing that the Jail's actual rule is the opposite of what's in the

manual: a guard must *not* report a co-worker's misconduct. Since they did not have an official duty to complain, *Garcetti* is inapplicable, plaintiffs maintain. (Another reason they advance this "code of silence" theory is to establish that the Jail has an official policy of punishing guards who speak out. See *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978). In response, the sheriff has agreed to accept liability if any of the guards is found liable; this does not affect analysis under *Garcetti*.)

Alaska v. EEOC, 564 F.3d 1062 (9th Cir. 2009) (en banc), supports plaintiffs' position. Lydia Jones, an aide to the Governor of Alaska, asserted that she had been sexually harassed at work. A second aide, Margaret Ward, corroborated the accusations in a workplace interview and press conference. The governor fired both of them. The ninth circuit held that *Garcetti* does not apply unless the employer has officially assigned to the employee a task of making *particular* speech, requiring the worker to act precisely as she did. Because Ward had not been commanded to file internal complaints or issue press releases, her suit could go forward. *Id.* at 1070–71 & n.7.

Yet *Garcetti* is not limited to tasks officially assigned to an employee. Ceballos himself did not have a duty to make the report, or include the accusations, that got him into trouble; communicating with his superiors was simply within the general ambit of his job. The Justices have distinguished between public and private speech by asking about the employer's real rules and expectations, not just official requirements contained in a manual or formal directive. *Garcetti*, 547 U.S. at 424–25. See also *Alaska*, 564 F.3d at 1074–76 (O'Scannlain, J., dissenting). See also *Riley v.*

Blagojevich, 425 F.3d 357 (7th Cir. 2005) (explaining why written job descriptions are not conclusive for identifying policy-making or discretionary jobs for which politics are an appropriate consideration).

Garcetti applies to job requirements that limit, as well as those that require, speech. Suppose the Jail put a guard in charge of maintaining a bulletin board, instructing him to post only materials that relate to workplace safety. If the guard puts up something on a different topic, or fails to put up anything, the management may discipline the guard without encountering an objection under the first amendment. See *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319–20 (7th Cir. 1995); cf. *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007) (school may discipline teacher for conducting an anti-war demonstration during class time).

And *Garcetti* can't be limited to "good" workplace requirements, as the ninth circuit supposed in *Alaska*. Ceballos was fired for reporting conduct that he believed was illegal. The Justices did not praise the district attorney's response; they held instead that state law rather than the federal Constitution determines whether a public work force is being well managed. If an employer has instructed the workers to keep their mouths shut during working hours on questions related to performance of their (and co-workers') jobs, the first amendment does not prevent the employer from enforcing that requirement. Whistle-blower protection statutes or labor law might provide a remedy (particularly if an employee is punished for reporting illegal acts), but the Constitution does not.

The purported code of silence is a ban on filing complaints about guard-on-inmate violence. Such a policy might be foolish; it might expose the County to other lawsuits; but it does not offend the first amendment, because what one guard says about another through the grievance system is part of the job, and the employer can discipline a guard for poor performance of work-related tasks. See *Mayer*, 474 F.3d at 479. Compare *Garcetti* with *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). We disapprove *Alaska v. EEOC* to the extent that decision rests on a belief that *Garcetti* applies only to speech expressly commanded by an employer. See also *Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009); *Haynes v. Circleville*, 474 F.3d 357 (6th Cir. 2007); *Thomas v. Blanchard*, 548 F.3d 1317 (10th Cir. 2008); *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009).

Bercasio, Fermaint, and the other guards are not plaintiffs' employer, however. Whether *Garcetti* protects their actions is a novel question. To recover under the first amendment, a plaintiff must prove, among other things, both that his speech was "protected" and that the government's (more accurately, a given state actor's) justification for curtailing the speech was inadequate. *Garcetti* appears to address the first question, but its reasoning focuses on the justification of a particular defendant: the government employer. Thus it is conceivable that the Court might hold the same speech "not protected" vis-à-vis the employer, but "protected" vis-à-vis co-workers.

This case illustrates the importance of properly characterizing *Garcetti*'s holding. If plaintiffs' speech is categorically not protected, any state actor can punish plaintiffs in any way he wishes without incurring liability under the first amendment. But if the Justices instead dealt with the justification of a particular state actor, the acts of one defendant (the sheriff) might be justified, while the acts of others (fellow guards) might not, for guards cannot assert the same interest in maintaining smooth operations as the Jail's administrators. Imagine that Cook County's in-house counsel, furious about the snitching, beat up Fairley after work. Why should the County's need for flexibility in running its Jail insulate the actions of all state actors? Though we have treated *Garcetti* as dealing with the question whether speech is protected, see, e.g., *Chaklos v. Stevens*, 560 F.3d 705, 711–12 (7th Cir. 2009); *Renken v. Gregory*, 541 F.3d 769, 773–75 (7th Cir. 2008), we have never considered how it applies to a non-employer.

Unfortunately for Fairley and Gackowski, their *Monell* argument—that the Jail has a policy forbidding complaints about guards who abuse inmates—links the guards' fates to the sheriff's. If a code of silence is the rule, then the guards were merely enforcing the Jail's policy. Although the guards' conduct might have been tortious or even criminal, see 720 ILCS 5/32-4 (witness tampering), plaintiffs do not want tort damages. They have framed their case in a way that can yield one of only two results: either everyone is liable under the first amendment or no one is liable. Since the first amendment does not support a claim against the sheriff, all defendants win.

Fairley and Gackowski might have contended that the General Orders, rather than an unwritten code of silence, were the official rule. As this argument would go, some guards set out to violate the Orders by punishing anyone who informs on another guard. The Jail's employment policies would be out of the picture, and we would have to decide whether *Garcetti* shields non-employer state actors who try to subvert the employer's policies. But plaintiffs argue only the inverse—that the Jail's policy is silence, and that guards enforce this through threats condoned, if not commanded, by management—so this theory is off the table. We reserve the question how *Garcetti* applies to punishments meted out by non-employers. (We emphasize that we express no opinion on the legality of defendants' conduct. We merely reject the argument that prohibiting guards from complaining to supervisors violates the first amendment.)

Plaintiffs' second theory is that they were bullied and threatened in order to deter them from testifying in *Fields*. This claim falls outside *Garcetti*. The Jail likely requires guards to testify on its behalf and pays them for time at court. Testifying against the Jail might not be part of the job, but that doesn't matter. Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, see 18 U.S.C. §1512, nor can it prevent them from testifying against it.

Defendants' only contention is that no one "retaliated" against plaintiffs for testifying, because the insults, assaults, and threats all preceded plaintiffs' depositions in *Fields*. This misapprehends the nature of plaintiffs' claim. The Constitution

prevents governmental actors from forbidding, or penalizing, speech that is protected under the first amendment. Penalties that follow speech are forbidden. This includes, but certainly is not limited to, reactions to what has already been said. E.g., *Milwaukee Deputy Sheriff's Association v. Clarke*, No. 08-3298 (7th Cir. July 21, 2009); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004); *Ridpath v. Marshall University*, 447 F.3d 292, 319–20 (4th Cir. 2006). (Of course, the sanction or threat must be serious enough to deter an ordinary person from speaking. *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).) But threats of penalties also are forbidden. That's why it can be misleading to speak of "retaliation" as the basis of a suit. The word implies that threats don't matter, and the district court here was misled.

Threatening penalties for future speech goes by the name "prior restraint," and a prior restraint is the quintessential first-amendment violation. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976) (judicial gag order); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552–53 (1975) (executive censorship). Indeed, for a time it appeared that prior restraints were the only actions forbidden by the first amendment. See *Schenck v. United States*, 249 U.S. 47 (1919). Later cases have held that penal ties for completed speech also violate the Constitution, but this development does not suggest that only post-speech penalties now matter.

The word "retaliation" has the potential, realized here, to divert attention from the rule that both threats designed to deter future speech and penalties for past speech are forbidden. "Retaliation" as a legal theory comes from employment-discrimination suits.

See, e.g., 31 U.S.C. §3730(h); 42 U.S.C. §12203. We have borrowed the word in cases where an employer punishes an employee on account of speech. E.g., *Chaklos*, 560 F.3d at 711. Using one word for two kinds of claim has the potential to confuse. Cf. *Krolnik v. Prudential Insurance Co. of America*, 570 F.3d 841 (7th Cir. 2009). Because only a subset of viable first-amendment claims involves retaliatory discharge, it is generally best to avoid the word.

The first amendment protects speakers from threats of punishment that are designed to discourage future speech. Fairley and Gackowski can recover from any defendants who made such threats—though there are two additional requirements.

One is proof of causation. Plaintiffs must show that their potential testimony, not their internal complaints, caused the assaults and threats. This means but-for causation. See *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977). Some decisions (*Matrisciano v. Randle*, 569 F.3d 723 (7th Cir. 2009), is the latest) say that a plaintiff just needs to show that his speech was a motivating factor in defendant's decision. These decisions do not survive *Gross*, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law. The record has evidence from which a reasonable jury could find causation; no more is necessary at this stage, but the instructions at trial must reflect the holding of *Gross*.

The second requirement is proof of damages. The largest item will be lost income, if plaintiffs can establish that the threats caused them to quit. Cf. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Lesser threats, defamation, and battery (the dry humping) also can lead to damages, if these are the sort of harms that would cause a reasonable person to keep quiet. *Bart*, 677 F.2d at 625. But because *Garcetti* covers the intra-Jail complaints, actions that occurred before the altercation in Special Incarceration Unit 2, such as the taunting that followed Gackowski's defense of inmate Brown, are not an appropriate source of damages.

One final observation. Plaintiffs pleaded a conspiracy claim under 42 U.S.C. §1985(3), but it's superfluous. The function of §1985(3) is to permit recovery from a private actor who has conspired with state actors. See *Dennis v. Sparks*, 449 U.S. 24 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). All defendants are state actors, so a §1985(3) claim does not add anything except needless complexity. Plaintiffs appear to think that the §1985(3) claim expands the scope of admissible evidence. But Fed. R. Evid. 801(d)(2)(E) (statement of coconspirator is not hearsay) applies whether or not the defendants are formally charged with a conspiracy. The rule making one conspirator's statements admissible against another rests on a theory of agency, not on the allegations in the complaint. If plaintiffs can show that the defendants acted in concert, then Rule 801(d)(2)(E) will apply. And the judge, not the jury, makes this decision. See Fed. R. Evid. 104(a); *United States v. Martinez de Ortiz*, 907 F.2d 629 (7th Cir. 1990) (en banc).

The judgment is affirmed to the extent that the district court dismissed plaintiffs' "code of silence" claim and the conspiracy claim. To the extent that it dismissed the prior-restraint claim, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

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FINAL JUDGMENT

August 20, 2009

BEFORE:

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No.: 07-3343	ROGER FAIRLEY and RICHARD GACKOWSKI., Plaintiffs - Appellants v. DENNIS ANDREWS, et al., Defendants - Appellees

Originating Case Information:
District Court No: 1:03-cv-05207 Northern District of Illinois, Eastern Division District Judge Amy J. St. Eve

The judgment of the district court is **AFFIRMED** to the extent that the district court dismissed plaintiffs' "code of silence" claim and the conspiracy claim. To the extent that it dismissed the prior-restraint claim, the judgment is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with the opinion. The above is in accordance with the decision of this court entered on this date. Appellants shall recover their costs.

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 03 C 5207

[Filed September 26, 2007]

ROGER FAIRLEY and RICHARD GACKOWSKI, Plaintiffs,	)
v.	)
SUPT. DENNIS ANDREWS, LT. EDWARD BYRNE, SGT. PATRICK LOIZON, OFC. EVAN FERMAINT OFC. NOBERTO BERCASIO, OFC. FRED COFFEY, OFC. RONALD PROHASKA, FORMER CHIEF INVESTIGATOR SAUL WEINSTEIN, CHIEF INVESTIGATOR TIM KAUFMANN, CHIEF INVESTIGATOR JUAN DIAZ, in their individual and official capacities, and SHERIFF MICHAEL SHEAHAN, in his official capacity, Defendants.	)

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Before the Court is Plaintiffs' motion for reconsideration of the Court's September 11, 2007 ruling granting Defendants' motion in limine #8. In the alternative, Plaintiffs move to stay the trial – scheduled to commence on October 9, 2007 – and to certify a question of law for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court held a hearing on Plaintiffs' motion and the parties have briefed the relevant issues. The Court presumes familiarity with its prior orders and the Seventh Circuit decision in *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007). For the following reasons, the Court denies Plaintiffs' motion for reconsideration and for certification for interlocutory appeal pursuant to Section 1292(b).

I. Motion for Reconsideration

A. Legal Standard

Because the Court's September 11, 2007, Minute Order granting Defendants' motion in limine #8 did not dispose of this case in its entirety, the Court reviews Plaintiffs' motion for reconsideration pursuant to Federal Rule of Civil Procedure 54(b). Under Rule 54(b), the Court may exercise its inherent authority to reconsider its interlocutory orders because such orders are "subject to revision at any time before the entry of judgment adjudicating all the claims." *See* Fed.R.Civ.P. 54(b); *see also Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("every order short of a final

decree is subject to reopening at the discretion of the district judge"). Accordingly, under Rule 54(b), the Court may correct any manifest errors of law or fact in its September 11, 2007 minute order. *See Zurich Capital Mkt., Inc. v. Coglianese*, 383 F. Supp. 2d 1041, 1045 (N.D. Ill. 2005) (citation omitted).

B. Procedural Background

On July 25, 2003, Plaintiffs Roger Fairley and Richard Gackowski, two former correctional officers who worked at the Cook County Jail, brought the present lawsuit alleging First Amendment retaliation and conspiracy claims, among others, against the Sheriff of Cook County and eight correctional officers, supervisors, and Sheriff's Office employees.[1]

On May 4, 2006, the Court granted Defendants' motion for summary judgment regarding Plaintiffs' conspiracy claim, namely, that Defendants conspired to deprive them of their constitutional right to free speech. The Court, however, denied Defendants' summary judgment motion concerning Plaintiffs' First Amendment retaliation claim and attendant *Monell* claim.

On May 30, 2006, the Supreme Court decided *Garcetti v. Ceballos*, ___U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). The *Garcetti* Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications

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[1] This case was reassigned to the Court on March 17, 2006.

from employer discipline." *Id.* at 1960. On June 9, 2006, Defendants Dennis Andrews, Edward Byrne, Ronald Prohaska, Tim Kaufmann, Saul Weinstein, and Michael Sheahan filed a Joint Motion for Summary Judgment based on *Garcetti.*

Meanwhile, on May 18, 2006, Defendants Evan Fermaint, Noberto Bercasio, and Fred Coffey filed an interlocutory appeal with the Seventh Circuit based on the Court's denial of summary judgment on their qualified immunity defense. On December 20, 2006, the Seventh Circuit issued its opinion dismissing the appeal for want of jurisdiction. *See Fairley v. Fermaint,* 471 F.3d 826, 829 (7th Cir. 2006). On January 3, 2007, Fermaint, Bercasio, and Coffey filed a Petition for Rehearing and Petition for Rehearing En Banc to the Seventh Circuit.

On March 19, 2007, the Seventh Circuit granted Defendants' Petition for Rehearing. *See Fairley v. Fermaint,* 482 F.3d 897 (7th Cir. 2007). In doing so, the Seventh Circuit concluded that Defendants' appeal was timely, and thus reached the merits of Defendants' qualified immunity defense. The Seventh Circuit then concluded that Defendants' qualified immunity defense relied upon questions of fact to be resolved at trial. *Id.* at 902. In making its determination, the Seventh Circuit stated:

> Our conclusion that this appeal is timely does not mean, however, that the defendants are home free. Defendants' principal argument relies on *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006), which holds that, "when public employees make statements pursuant to their official duties, the employees are not speaking

as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. Defendants invoke *Garcetti* for the proposition that plaintiffs' speech in the workplace is not covered by the first amendment, so they are entitled to prevail even though their reactions to that speech are asserted to be extra-legal and reprehensible. Such responses may be actionable under state law in the wake of *Garcetti*, defendants allow, but cannot be treated as constitutional torts.

Plaintiffs maintain, however, that defendants reacted adversely to two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits. Assistance to prisoners and their lawyers in litigation is not part of a guard's official duties. To apply *Garcetti*, therefore, we would need to determine whether defendants reacted to plaintiffs' activities in litigation (they say not) and which of defendants' deeds can be traced to the litigation as opposed to events at work. Piecing out the state of the record, and drawing inferences from the evidence, is not allowed on an interlocutory appeal based on a claim of immunity. The role of an appeal under *Mitchell* and *Behrens* is to determine whether the legal principles that apply to public officials were clearly established at the time those officials acted; it is not to determine what the officials

did in fact, for that would impinge on the jury's task.

Id.

On April 16, 2007, the Court denied Defendants' Second Motion for Summary Judgment based on *Garcetti* and denied Defendants' motion for reconsideration on May 7, 2007. The Court concluded that there were genuine issues of material fact for trial whether: (1) Plaintiffs assisted in the Fields litigation prior to their 2003 Fields depositions; and (2) Defendants retaliated against Plaintiffs based on such assistance. (R. 826-1, May 7, 2007, Minute Order at 2.)

C. The Effect of *Garcetti*

The Supreme Court's opinion in *Garcetti* has had a significant impact on Plaintiffs' case. When Plaintiffs filed this lawsuit, they premised their First Amendment retaliation claims on speaking out while at work against alleged physical abuse of inmates by correctional officers at the CCDOC. Three years later, *Garcetti* "significantly limit[ed] First Amendment protection of public employees' speech." *Salas v. Wisconsin Dep't of Corrections*, 493 F.3d 913, 925 (7th Cir. 2007). In *Garcetti*, the Supreme Court held that public employees who make statements pursuant to their official duties "are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 126 S.Ct. 1951, 1960. Because the majority of Plaintiffs' allegations pertained to speech made as part of their official duties, such claims are no longer viable under the First Amendment. The only speech in this case that remains protected after

Garcetti pertains to speech and expressions regarding Plaintiffs "[a]ssistance to prisoners and their lawyers in litigation ...." *Fairley v. Fermaint,* 482 F.3d 897, 902 (7th Cir. 2007). Because Plaintiff Fairley's first deposition in the Fields Litigation took place shortly before he resigned and his second deposition occurred months after his resignation and because Plaintiff Gackowski's depositions in the Fields Litigation took place after he resigned, Plaintiffs' case is significantly narrowed.

Given the limits *Garcetti* has imposed, Plaintiffs now seek to expand their theory of the case to cover claims that the Seventh Circuit does not recognize. Plaintiffs' counsel argues that this new theory is an "outgrowth" of *Garcetti*. Specifically, Plaintiffs claim that from July 2000 – the date of the Fields incident at the CCDOC which subsequently resulted in the Fields Litigation – any harassment of Plaintiffs by Defendants was an effort to intimidate them and chill any future speech that is covered under the First Amendment, namely, any assistance to the plaintiffs in the Fields Litigation, even though Plaintiffs had not engaged in any protected speech at that time.

D. Minute Order of September 11, 2007

Defendants motion in limine #8 sought to preclude the admission of a hand written memorandum written by Plaintiff Fairley. In addressing the motion, the Court stated:

> Plaintiffs correctly note that "the conduct at issue not only involves actions after Plaintiffs' depositions in the Fields Litigation, but also any adverse conduct related to Plaintiffs' overall

assistance to the Fields Litigation." Instead of setting forth any such adverse conduct related to the memorandum, Plaintiffs argue that Defendants "attempted to silence plaintiff Fairley (and plaintiff Gackowski) by intimidating them, so they would not reveal during the course of the Fields litigation what they knew about incidents of excessive force, specifically including the July 29, 2000 beating in the SI-2 Unit." According to Plaintiffs, because the memorandum contains speech that Defendant attempted to suppress through "intimidating and harassing Fairley from as early as 2000" is it relevant and admissible. Plaintiffs go too far.

....

It is clear that the First Amendment protects a public employee's right to speak as a citizen about matters of public concern under certain circumstances. *Garcetti v. Ceballos*, ___ U.S. ___, ___, 126 S.Ct. 1951, 1957, 164 L.Ed.2d 689 (2006). As the Seventh Circuit recently noted,

> *Garcetti* made it clear that public employees have no cause of action for First Amendment retaliation unless they were disciplined for speaking *as citizens* about a matter of public concern. 126 S.Ct. at 1958, 1960. When public employees make statements pursuant to their official duties, they are not speaking as citizens and "the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. In other words, if Spiegla's statements to Schrader were made pursuant to her official duties as a correctional officer, it was not protected

> speech and she has no claim for First Amendment retaliation.

Spiegla v. Hull 481 F.3d 961, 963-64 (7th Cir. 2007). The protection applies to *speech*, not to future speech. *See Wernsing v. Thompson* 423 F.3d 732, 752 (7th Cir. 2005) ("I n the retaliation context, speakers simply may not invoke the protections of the First Amendment based on unexpressed viewpoints or un-uttered thoughts"); *Remus v. Sheahan* 2006 WL 418654, at *5 n.11 (N.D. Ill. 2006) (citing *Wernsing,* 423 F.3d at 752-53) ("Plaintiff also alleges that Ryan and Sheahan were motivated by their expectation that plaintiff would not lie about having requested a full investigation. SAC ¶¶ 47, 53. Plaintiff, however, does not allege that he actually spoke out about there being a coverup. The retaliation claim cannot be based on speech that never actually occurred"). Further, an essential element of Plaintiffs' Section 1983 retaliation claim is that their speech was a substantial or motivating factor in the retaliation. *See Ashman v. Barrows*, 438 F.3d 781, 784 (7th Cir. 2006). Plaintiffs have not identified any case law – and the Court has found none – to support their theory that the First Amendment protects silence. While this memorandum is the type of speech that could be protected under *Garcetti* because it involves Plaintiff Fairley's assistance in ongoing litigation, Plaintiffs have not argued the necessary link between it and Defendants. Because Plaintiffs have failed to identify any evidence that Defendants knew of this memorandum and that it was a motivating factor in their alleged retaliated against Plaintiffs, the memorandum is not admissible. The Court is granting the motion without prejudice. If

Plaintiffs can establish this evidentiary link at trial, they can ask the Court to revisit this issue.

(R. 970-1, Sept. 11, 2007, Minute Order, at 3-4.)

E. Plaintiffs' Arguments

In their motion for reconsideration, Plaintiffs argue that the Court's in limine ruling was a manifest error of law because the Court concluded that Plaintiffs' silence prior to Defendants' alleged retaliatory conduct was not protected speech. *See Wernsing v. Thompson*, 423 F.3d 732, 873 (7th Cir. 2005) ("In the retaliation context, speakers simply may not invoke the protections of the First Amendment based on unexpressed viewpoints or un-uttered thoughts."). Plaintiffs' reconsideration motion goes beyond the Court's ruling on Defendants' in limine motion, however, and to the heart of Plaintiffs' theory of the case – a theory that Plaintiffs admittedly have had to modify since *Garcetti*. Plaintiffs now define their theory of the case as such: "[T]he First Amendment protects speech on matters of public concern which defendants had reason to believe plaintiffs would utter during their *Fields* testimony, and that the First Amendment therefore prohibited defendants from taking adverse actions against plaintiffs to prevent them from engaging in that protected speech." (R. 1000-1, Pls.' Mot. Recons. Reply, at 5.) Although Plaintiffs acknowledge that First Amendment retaliation claims require that a public employee's protected speech must precede a defendant's retaliatory conduct, they contend that this First Amendment claim is not a traditional retaliation claim. Instead, Plaintiffs are attempting to bring a derivative First Amendment retaliation claim based on

the chilling of their protected speech without showing that any protected speech preceded Defendants' retaliatory harassment and intimidation.

In support of this novel theory, Plaintiffs rely on Fourth Circuit case law:

> A chilling claim is essentially the derivative of a retaliation claim: if a public employer cannot fire, demote, or similarly punish a public employee for engaging in protected speech, the employer also cannot intimidate the employee into silence by threatening impermissible retribution.

Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 319 (4th Cir. 2006); *see also Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) ("a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment.").[2] Plaintiffs admit that "[a]lthough it is true that in both these [Fourth Circuit] cases, the defendants knew or anticipated that the plaintiffs would engage in future protected speech because of previous related protected speech which had been retaliated against by defendants, nothing in the Court of Appeal's rationale suggests that a defendant's knowledge of a plaintiff's

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[2] Plaintiffs have called their proposed derivative claim more than one name. In their proposed jury instructions, Plaintiffs labeled this claim a "First Amendment Intimidation Regarding Fields Case Testimony." (R. 887-3, Pls.' Proposed Jury Instruction #36.) At the hearing on the present motion, Plaintiffs called their claim an "anticipatory" claim based on "intimidation of future speech." (Hr'g Tr. Sept. 18, 2007.)

prior protected speech is a prerequisite for a First Amendment 'chilling claim.'" (R. 984-1, Pl.'s Mot. Recons., at 3.)

To establish a First Amendment retaliation claim, "a public employee must present evidence that: (1) his speech was constitutionally protected, (2) he has suffered a deprivation likely to deter free speech, and (3) his speech was at least a motivating factor in the employer's action." *Massey v. Johnson,* 457 F.3d 711, 716 (7th Cir. 2006) (citing *Spiegla v. Hull,* 371 F.3d 928, 935, 940-41 (7th Cir. 2004)). Meanwhile, although the Seventh Circuit has not recognized a separate, discrete claim for intimidation or chilling under the First Amendment, it recognizes that "harassment just as much as a formal discharge, may be actionable if it is designed to deter a public employee's free speech" and that "[g]overnment retaliation tends to chill an individual's exercise of his First Amendment rights."[3]

---

[3] The Court notes that last year a Colorado federal district court rejected a plaintiff's First Amendment "chilling" claim:

> To the extent the Amended Complaint could be read to allege separate claims for retaliation and chilling, I note that the parties focus on retaliation in their written arguments on the motion to dismiss. Further, I observe that Spagnuolo has not pointed to any Tenth Circuit or Supreme Court law clearly establishing a chilling claim separate and apart from a public employee retaliation claim. *Cf. Ridpath v. Bd. of Governors Marshall University,* 447 F.3d 292, 319 (4th Cir. 2006) ("A chilling claim is essentially the derivative of a retaliation claim: if a public employer cannot fire, demote, or similarly punish a public employee for engaging in protected speech, the employer also cannot intimidate the employee into silence by threatening impermissible retribution").

Massey, 457 F.3d at 720; *see also Pickering v. Board of Educ.*, 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) ("threat of dismissal from public employment" is "a potent means of inhibiting speech"). Nevertheless, the Seventh Circuit has never recognized a First Amendment public employee claim – whether you call it retaliation or not – in which the plaintiff's protected speech need not precede a defendant's actionable conduct.

Although Plaintiffs argue that whether their protected speech comes before or after Defendants' retaliatory conduct is irrelevant, they rely on cases where the protected speech occurred before the defendant's actionable conduct in support of their theory.[4] Plaintiffs, for example, rely on *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), in which the protected speech involved a public employee's allegation that she was reprimanded for endorsing a candidate for public office. More specifically, subsequent to the plaintiff's endorsement of a political candidate, the defendants allegedly pursued a campaign of petty harassments. *Id.* In analyzing the plaintiff's First Amendment claim, the Seventh Circuit stated:

Spagnuolo v. City of Longmont, Colo., No. 05 C 0729, 2006 WL 2594484, at *5 n.10 (D. Colo. Sept. 11, 2006).

[4] In the two unpublished Northern District of Illinois cases upon which Plaintiffs rely, the defendants reacted to plaintiffs' protected speech that occurred first. *See Munoz v. Chicago Sch. Reform*, 99 C 4723, 2000 WL 152138 (N.D. Ill. Feb. 4, 2000); *Klipfel v. ATF*, No. 94 C 6415, 1996 WL 566452 (N.D. Ill. Sept. 27, 1996).

> It is true that a certain air of the ridiculous hangs over the harassment allegations, in particular the allegation that we quoted earlier regarding the birthday cake. But we cannot say as a matter of law that the exercise of First Amendment rights by public employees cannot be deterred by subjecting employees who exercise them to harassment and ridicule through selective enforcement of work rules. The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable. Yet even in the field of constitutional torts *de minimis non curat lex*. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise that if the Mayor of Springfield had frowned at Miss Bart for running for public office he would be liable for damages (unprovable, of course) under section 1983. However, more is alleged here – an entire campaign of harassment which though trivial in detail may have been substantial in gross. It is a question of fact whether the campaign reached the threshold of actionability under section 1983.

Id. (internal citations omitted).

Here, the parties do not dispute that a campaign of harassment is actionable under the First Amendment as *Bart* instructs, and Plaintiffs certainly allege more

than petty or trivial harassing and intimidating conduct on the part of Defendants. *See Spiegla*, 371 F.3d at 941 ("a § 1983 case does not require an adverse employment action within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964. Rather, "***[a]ny*** deprivation ... that is likely to deter the exercise of free speech ... is actionable.") (emphasis in original) (citations omitted). Nevertheless – as in the Fourth Circuit cases – the *Bart* plaintiff's protected speech occurred first after which the defendants reacted. *See id.; see also Andrekus v. Board of Educ. Dist. U-46*, 02 C 3960, 2004 WL 2535274, at *7 (N.D. Ill. Sept. 28, 2004) ("To establish First Amendment retaliation, a plaintiff must show that she engaged in constitutionally protected speech and that that speech was a substantial or motivating factor in the defendant's retaliatory action. By definition, the defendant's retaliatory actions must be in response to, *i.e.*, follow, the plaintiff's exercise of her constitutional rights.").

Plaintiffs also attempt to distinguish *Wernsing v. Thompson*, 423 F.3d 732 (7th Cir. 2005), which the Court relied upon in its in limine ruling. *See id.* at 752 ("plaintiffs are actually referring to speech which has not yet occurred, which, for First Amendment retaliation purposes, is no speech at all."). In *Wernsing*, employees at the Illinois Office of the Inspector General ("OIG") in the Department of Human Services ("DHS") sent two e-mails in November 2000 to the Inspector General, Odell Thompson, stating that they had concerns about the appointment of the OIG's Southern Bureau Chief and wanted to meet with Thompson. *Id.* at 737-38. Thompson did not respond to the plaintiffs' e-mails. *Id.* at 738. In December 2000, however, Thompson sent a

letter to the e-mail signatories that the OIG staff was not authorized to communicate about the office's polices or operations directly to the DHS Secretary, to the press, or to any external agent except with the Inspector General's approval and consent. *Id.* at 738. This directive was repeated in a second communication that Thompson sent to all OIG employees. *Id.* In January 2001, one of the plaintiffs called Thompson about the directives after which he yelled at her and told her she was "walking down the road to getting fired." *Id.* at 739. Thereafter, the Inspector General attended a meeting of the Southern Bureau staff where he met with the e-mail signatories and asked them about their concerns. *Id.* at 739. They explained their concerns about the appointment of an individual for the Southern Bureau Chief. *Id.*

The *Wernsing* plaintiffs alleged that on the heels of the e-mails and correspondence with Thompson, he committed several acts of retaliation for their inquiries and requests for a meeting. *Id.* In addition, the plaintiffs alleged a claim of unlawful prior restraint on speech based on Thompson's directive prohibiting unapproved discussions of OIG business. *Id.* at 740. The district court granted the plaintiffs' summary judgment motion on their prior restraint claim. *Id.* at 741. Furthermore, the district court denied the Inspector General's motion for summary judgment on the plaintiffs' retaliation claim concluding that the plaintiffs' e-mails to the Inspector General were constitutionally protected speech and there were material questions of fact remaining for trial whether the plaintiffs' protected speech was a motivating factor in the retaliatory conduct. *Id.* The district court also denied the Inspector General's qualified immunity claim concluding that it was clearly established that

Thompson's alleged actions restricting and retaliating against the plaintiffs' speech on matters of public concern violated the plaintiffs' constitutional rights. *Id.* Thereafter, the Inspector General appealed the qualified immunity ruling. *Id.*

On appeal, the Seventh Circuit held that the Inspector General was entitled to qualified immunity on the plaintiffs' prior restraint claim because "it was not clearly established, at the time the pre-clearance directive was first issued (December 5, 2000), that such a directive constituted an unlawful prior restraint on speech." *Id.* at 747. The *Wernsing* court reasoned that

> while the constitutional limits of restraints applicable to the general public are well-settled, and while the Supreme Court has struck down formal statutory bans of certain speech activity by government employees, the prerogatives of a government supervisor in managing the communications of his own staff are far less clear. We emphasize that our analysis of qualified immunity here is focused specifically and exclusively on this kind of relatively informal supervisory directive aimed at close subordinates.

Id. at 748 (internal citation omitted).

The *Wernsing* court then turned to the Inspector General's qualified immunity defense concerning the plaintiffs' First Amendment retaliation claim and addressed whether the plaintiffs had established a deprivation of a constitutional right. The court analyzed the plaintiffs' claims under the *Connick*-

Pickering test, concluding that the plaintiffs had failed to demonstrate that they engaged in speech on a matter of public concern. *Id.* at 751. Specifically, the Seventh Circuit concluded that because the plaintiffs' November 2000 e-mails did not articulate a particular viewpoint, grievance, or complaint – but instead just requested a meeting with the Inspector General – the e-mails did not constitute speech on a matter of public concern. *Id.* at 752. The *Wernsing* court further rejected the plaintiffs' argument that the court should consider the content of what the plaintiffs desired to communicate to the Inspector General, and that the court should focus its inquiry on the underlying speech that plaintiffs sought to bring to the Inspector General's attention, namely, their specific concerns involving the appointment of the Southern Bureau Chief. *Id.* The *Wernsing* panel reasoned:

> This line of argument is nonsensical. In their references to "underlying speech" that is "sought" to be expressed, plaintiffs are actually referring to speech which has not yet occurred, which, for First Amendment retaliation purposes, is no speech at all. This Court's precedents instruct that the ***content*** of the speech is the most important factor in determining the public concern element, not the inchoate intentions or views that the speaker privately holds.
>
> ...
>
> In the retaliation context, speakers simply may not invoke the protections of the First Amendment based on unexpressed viewpoints or un-uttered thoughts. Government officials are not mind readers. The fact that members of the OIG wanted to meet with the Inspector

> General about the rumored appointment of an unspecified person does not, by itself, constitute a matter of concern to the public.

Id. at 752-53 (internal citations omitted) (emphasis in original). The Seventh Circuit further noted that "otherwise unprotected speech does not suddenly attain protected status simply because it is animated by a viewpoint which, if actually expressed, might itself merit First Amendment protection." *Id.* at 752.

Although the content of Plaintiffs' speech is not at issue here, the *Wernsing* decision is instructive to this Court's analysis of Plaintiffs' argument that their unexpressed speech prior to Defendants' intimidating or retaliatory conduct constitutes a violation of the First Amendment. Simply put, this Court cannot ignore the Seventh Circuit's conclusion that for First Amendment retaliation purposes "speech which has not yet occurred ... is no speech at all." *Id.* at 752; *see, e.g., Gross v. Town of Cicero,* No. 03 C 9465, 2006 WL 288262, at *10 n.3 (N.D. Ill. Feb. 1, 2006) ("simply being named as a potential witness in the *Moreno* case would not constitute protected speech. *See Wernsing,* 423 F.3d at 752 (speech that has not occurred, 'for First Amendment retaliation purposes, is no speech at all.')"). Furthermore, Plaintiffs have not given this Court any compelling reason to ignore this precedent.

Plaintiffs also contend that *Wernsing* supports their derivative intimidation/chilling claim because "the Seventh Circuit recognized that a § 1983 action would lie if a public employee's future protected speech is chilled by governmental supervisors, characterizing such a claim as a 'prior restraint claim.'" (R. 984-1, Pls.' Mot. Recons., at 5.) At the hearing on this motion,

Plaintiffs' argued that *Wernsing* considered a "prior restraint harassment claim." (Hr'g. Tr. Sept. 18. 2007).

Plaintiffs' argument is misplaced for several reasons, especially because the language they rely upon concerns the Inspector General's argument on appeal "that plaintiffs lack standing to challenge his pre-clearance directive since they have not demonstrated any 'actual injury or any imminent threat of injury due to the directive.'" *Id.* at 743. More specifically, on appeal the Inspector General claimed that "in order to make out a concrete 'injury in fact' for standing purposes, plaintiffs must have sought permission to speak, been denied, spoken out anyway and been subject to discipline." *Id.* The Seventh Circuit rejected the Inspector General's argument – "the hypothetical chain of events outlined by Thompson describes a First Amendment retaliation case involving post-hoc punishment for disfavored speech, not a prior restraint which seeks to limit expressive activity before it occurs." *Id.*

First and foremost, the *Wernsing* decision did not characterize an action pertaining to a public employee's future protected speech as a "prior restraint harassment claim." Instead, the Seventh Circuit was analyzing the *Wernsing* plaintiffs' prior restraint speech claim based on the Inspector General's internal e-mails. As the court explained:

> We note at the outset that the plaintiffs, in challenging an internal e-mail as a "prior restraint" on speech, advance a somewhat unconventional claim. Prior restraints frequently arise in the form of judicial injunctions against certain types of speech (to

> which the collateral-bar rule applies), or, perhaps less commonly, in the form of formal statutes or regulations barring or constraining certain expressive activity. *But see Crue v. Aiken,* 370 F.3d 668, 679-80 (7th Cir. 2004) (characterizing a university president's internal pre-clearance directive, disseminated via e-mail, as a prior restraint on speech). Here, since both sides have used the phrase "prior restraint" in marshaling their arguments, we will also use that term. However, we offer no view as to whether, as a general proposition, an e-mail directive should always be analyzed in the same way as an injunction, statute or a formal regulation.

Id. at 743 n.3.

In addition, the *Wernsing* court's reference to the Inspector General's "hypothetical chain of events" describing "a First Amendment retaliation case involving post-hoc punishment for disfavored speech, not a prior restraint which seeks to limit expressive activity before it occurs" is dicta because this reasoning was not essential to the *Wernsing* court's decision. *See Tate v. Showboat Marina Casino P'ship,* 431 F.3d 580, 582 (7th Cir. 2005). As such, Plaintiffs' attempt to use this language to establish an intimidation/anticipatory claim is without merit.

Finally, the language in *Fairley v. Fermaint,* 482 F.3d 897 (7th Cir. 2007), supports the Court's conclusion that there is no legal basis for a intimidation/chilling claim where protected speech need not precede a defendant's actionable conduct. As the Seventh Circuit explained:

> Plaintiffs maintain, however, that defendants ***reacted adversely*** to two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits. Assistance to prisoners and their lawyers in litigation is not part of a guard's official duties. To apply *Garcetti*, therefore, we would need to determine ***whether defendants reacted to plaintiffs' activities in litigation*** (they say not) and which of defendants' deeds can be traced to the litigation as opposed to events at work.

Id. at 902 (emphasis added). In short, the Seventh Circuit instructs that the relevant issue here is how Defendants reacted to Plaintiffs' protected speech – not how Defendants acted before Plaintiffs' protected speech.

Based on *Wernsing*, established First Amendment retaliation precedent, and the lack of authority supporting Plaintiffs' derivative intimidation claim, the Court denies Plaintiffs' motion for reconsideration because the Court did not commit a manifest error of law in its in limine ruling. *See Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (manifest error of law is wholesale disregard, misapplication, or failure to recognize controlling precedent).

II. Motion to Stay & Certify Appeal

In the alternative, Plaintiffs request that the Court stay the trial scheduled to begin on October 9, 2007, and certify for appeal the question of "whether Section 1983 permits a cause of action for harassment and

intimidation in anticipation of and to discourage future speech protected by the First Amendment." (R.984-1, Pls.' Mot. Recons., at 9.)

Section 1292(b) provides that an interlocutory appeal may be taken if the underlying order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and if "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "Certification by the district court is a jurisdictional prerequisite to interlocutory review under § 1292(b)." *In re Ford Motor Co., Bridgestone/Firestone North American Tire, LLC,* 344 F.3d 648, 653 (7th Cir. 2003) ("both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden."). "Interlocutory appeal is appropriate when (1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation, and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed." *Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief,* 291 F.3d 1000, 1007 (7th Cir. 2002) (citing *Ahrenholz v. Board of Trs. of Univ. of Ill.*, 219 F.3d 674, 675-76 (7th Cir. 2000)). "Unless ***all*** these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b)." *Ahrenholz,* 219 F.3d at 676 (emphasis in original).

Here, there is no dispute that Plaintiffs' question that they seek to certify is a controlling question of law. *See Ahrenholz*, 219 F.3d at 676 (question of law

"has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine"). In fact, Defendants offer their own questions for certification.[5] Defendants, however, contend that the *Wernsing* decision already resolved the relevant legal issue in this matter, thereby casting doubt on whether this legal issue is contestable as required under Section 1292(b).

"A question of law is contestable if there are substantial conflicting decisions regarding the claimed controlling issue of law, or the question is not settled by controlling authority and there is a substantial likelihood that the district court ruling will be reversed on appeal." *Calvin v. Sheriff of Will County,* No. 03 C 3086, 2006 WL 1005141, at *4 (N.D. Ill. Apr. 14, 2006); *see also Mannix v. Machnik,* No. 05 C 7232, 2006 WL 566447, at *3 (N.D. Ill. March 3, 2006) ("contested question of law," is defined as one creating a "substantial ground for difference of opinion.") (citing 28 U.S.C. § 1292(b)). As discussed in detail above, Plaintiffs have failed to present any case law – controlling or otherwise – that a public employee's protected speech under the First Amendment need not

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[5] Because Defendants have not filed a separate motion under Section 1292(b), the Court need not consider their questions for interlocutory appeal, especially in light of their bare-boned arguments in support of these questions. *Kochert v. Adagen Medical Int'l Inc,.* 491 F.3d 674, 679 (7th Cir. 2007) ("undeveloped arguments are waived"). Moreover, Defendants' second query involves a question of fact, and thus is not appropriate for interlocutory appeal under Section 1292(b). *See Ahrenholz,* 219 F.3d at 677 (appropriate question for interlocutory appeal is "something the court of appeals could decide quickly and cleanly without having to study the record").

precede Defendants' intimidating and retaliatory conduct, regardless of how the cause of action is labeled. Thus, there are no conflicting decisions regarding the controlling issue of law. Plaintiffs' reliance on the Fourth Circuit cases for a derivative retaliation claim – alone – does not make their question contestable, especially because controlling authority, *Wernsing v. Thompson,* 423 F.3d 732 (7th Cir. 2005), holds that for First Amendment retaliation purposes, speech which has yet to occur is no speech at all. *Id.* at 752. In other words, Plaintiffs have not established that there is a "substantial ground for difference of opinion" concerning the existence of a First Amendment chilling/intimidation claim that does not require a plaintiff's protected speech to precede a defendant's actionable conduct. Finally, under the circumstances, the Court cannot conclude that its decision likely will be reversed on appeal.

Because Plaintiffs have failed to satisfy the statutory requirement that the controlling legal issue is contestable, the Court need not address the other criteria under Section 1292(b). *See Ahrenholz,* 219 F.3d at 676. Accordingly, the Court denies Plaintiffs' motion to certify a legal question for interlocutory appeal.

III. Defendants' Motion for Reconsideration

In the alternative, Defendants request that the Court reconsider its April 16, 2007 order denying Defendants' Second Motion for Summary Judgment and its reconsideration order of May 7, 2007, based on Plaintiffs' concession that they did not engage in protected speech prior to the alleged acts of retaliation. Defendants, however, do not point to any transcript or part of the record where Plaintiffs allegedly made this

concession. Without more, the Court declines to revisit its earlier rulings as Defendants request.

CONCLUSION

For these reasons, the Court denies Plaintiffs' Motion for Reconsideration and Motion to Stay and Certify a Question of Law for Interlocutory Appeal.

Dated: September 24, 2007

ENTERED

/s/ Amy J. St. Eve
AMY J. ST. EVE
United States District Judge

APPENDIX C

Order Form (01/2005)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	03 C 5207	**DATE**	9/26/2007
CASE TITLE	Fairley vs. Andrews		

DOCKET ENTRY TEXT

In Court Hearing Held on 9/26/2007. Pursuant to RESPONSE [1011] by Plaintiffs Roger Fairley, Richard Gackowski to Defendants' Motion for Reconsideration of Denial of Defendants' Motion for Summary Judgment, is converted to a motion by Plaintiff do dismiss. Plaintiffs' motion is granted and judgment is entered in favor of Defendants. All pending motions [889] [938] [940] are denied as moot. Pretrial Conference set for 9/28/2007 is stricken. Jury Trial set for 10/9/2007 is stricken. Civil case terminated.

■[For further details see text below.]

Notices mailed by Judicial staff.
*Mail AO 450 form.

STATEMENT

Plaintiffs have filed a "response" to Defendants' motion for reconsideration of denial of Defendants' motion for summary judgment which, as noted in open court, is actually a motion to dismiss based on Plaintiffs' concession that they no longer can prove their case. In court, Plaintiffs' counsel conceded:

> "And the problem is that those are not the activities of which we have evidence that the defendants were aware. And, therefore, whether they were protected speech or not protected speech, there is a a causation problem that we cannot overcome. That's the reason why we come before you seeking this relief."

This concession is based on the Court's construction of *Garcetti v. Ceballos*, ___U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), and the Court's refusal to recognize a cause of action based on an intimidation theory as set forth in the Court's September 24, 2007 Memorandum Opinion. (R. 1005-1; R. 1012-1 (corrected version)).

As stated in their filing, Plaintiffs contend that they are "left with no proper alternative than to concede that, in light and because of this Court's rulings, Defendants' Joint Motion for Summary Judgment based on *Garcetti* should be granted as to all Defendants." (R. 1011-1, Pls.' Resp., at 10.) Based on

Plaintiffs' admission, the Court grants hereby grants Plaintiffs' motion and enters judgment for Defendants.

APPENDIX D

AO 450(Rev. 5/85)Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

Case Number: 03 C 5207

[Filed September 26, 2007]

Fairley	)
	)
v.	)
	)
Andrews, et al	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that In Court Hearing Held on 9/26/2007. Pursuant to RESPONSE [1011] by Plaintiffs Roger Fairley, Richard Gackowski to Defendants' Motion for

Reconsideration of Denial of Defendants' Motion for Summary Judgment, is converted to a motion by Plaintiff do dismiss. Plaintiffs' motion is granted and judgment is entered in favor of Defendants. All pending motions [889] [938] [940] are denied as moot. Pretrial Conference set for 9/28/2007 is stricken. Jury Trial set for 10/9/2007 is stricken. Civil case terminated.

Date: 9/26/2007

Michael W. Dobbins, Clerk of Court

/s/ Theresa Hammonds, Deputy Clerk

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 07-3343

September 21, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*
RICHARD A. POSNER, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*

ROGER FAIRLEY and RICHARD GACKOWSKI, *Plaintiffs-Appellants*,	)
v.	)
DENNIS ANDREWS, *et al.*, *Defendants-Appellees*.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 5207
Amy J. St. Eve, *Judge*.

Order

Defendants-appellees filed a petition for rehearing and rehearing en banc on September 3, 2009. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Flaum and Judge Rovner did not participate in the consideration of this petition.

Supreme Court, U.S.
FILED
APR 19 2010
OFFICE OF THE CLERK

No. 09-745

IN THE

Supreme Court of the United States

DENNIS ANDREWS, TIM KAUFMANN, SAUL WEINSTEIN, NOBERTO BERCASIO, FRED COFFEY, EVAN FERMAINT, RONALD PROHASKA and EDWARD BYRNE,

Petitioners,

v.

ROGER FAIRLEY and RICHARD GACKOWSKI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the appellate court correctly held that harassment of two county correctional officers, that included threats of physical violence and battery, made under color of law and with the purpose of intimidating the employees from providing truthful and constitutionally protected testimony in a civil lawsuit, is actionable under the First Amendment.

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REASONS FOR DENYING THE PETITION

Petitioners set out to silence – through harassment, threats of physical violence and batteries – Respondents' truthful testimony in a well-publicized case about the use of excessive force at the Cook County Jail. That such conduct, when done under color of law, is actionable as a violation of the First Amendment is obvious, unremarkable and does not warrant this Court's attention. Rather than cite any applicable section of Supreme Court Rule 10, Petitioners attempt to divert the Court's attention by asserting that certiorari should be granted because the Seventh Circuit Court of Appeals has "effectively transform[ed] the most basic of juvenile schoolyard threats – 'if you tell on me, I'll beat you up '– into a prima facie federal cause of action." Pet. at 7. The Court of Appeals did no such thing. Instead, the appellate opinion, citing this Court's cases from as far back as 1919, upholds the axiomatic proposition that "[t]hreatening penalties for future speech goes by the name 'prior restraint,' and a prior restraint is the quintessential first amendment violation." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (citing *Schenck v. United States*, 249 U.S. 47, 51-52 (1919)("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose.")). Not only is there no split in the Courts of Appeal on the legal issue raised in this petition, but the appellate court holding is based on well-established law and in no way "conflict[s] with relevant decisions of this Court." *See* Supreme Court Rule 10(a) & (c). The grant of a petition for certiorari requires "compelling reasons," which are entirely lacking here.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) (in dismissing the writ, the Court stated, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.") Accordingly, the writ must be denied.

STATEMENT OF THE CASE

Petitioners trivialize the constitutional violation here (as well as the appellate court's opinion) when they assert that the harassment in this case is akin to a playground argument among schoolchildren. Pet. at 7. The harassment in this case is substantially more serious than a typical schoolyard quarrel. As correctional officers at the Cook County Jail, Fairley and Gackowski routinely witnessed fellow officers beat and abuse inmates. R.553-6 at ¶¶46, 51, 71-72, 198, 201, 246-247, 311-312; R.686 at 4-7.[1] When they objected to and reported the abuse, their fellow officers and supervisors viciously harassed and taunted them.[2] On

1. Reference to "R." is to the number assigned by the clerk on the civil docket.

2. The record is replete with testimony about these incidents. The appellate court, relying on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), held this speech is not protected by the First Amendment and that any harassment Respondents suffered as a result of that speech is not actionable. *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009).

July 29, 2000, Fairley witnessed Petitioners Fermaint and Bercasio and other officers beat handcuffed and shackled inmates in and near the "Special Incarceration 2 Unit" (the "SI-2 Incident"). R.553-6 at ¶71, 74; R.686 at 5. Fairley yelled at the officers to stop beating the inmates. R.553-6 at ¶76; R686 at 5. Petitioner Byrne, however, told the officers, "They want to hurt my officers. Fuckin' kill 'em. They deserve to die." R.553-6 at ¶77. On August 5, 2000, Byrne told Gackowski that during the SI-2 Incident, Byrne had twisted and jumped on an inmate's leg in an attempt to break it but that he could not get it to "snap." R.553-6 at ¶89. During that same discussion, Petitioner Fermaint told Gackowksi, "[w]e got [inmate] Scott. We beat that bitch's ass." R.553-6 at ¶90.

On August 16, 2000, the inmates who had been beaten during the SI-2 Incident filed a lawsuit (the "*Fields* Litigation"). R.553-6 at ¶¶104-105; R.686 at 6. The filing of that case received substantial media attention, and was widely discussed among officers. R.553-6 at ¶¶106-124. It became widely known that an investigator working for the inmates' counsel attempted to interview Fairley, already an officer widely derided as an "inmate lover." R.686 at 7-8. After the SI-2 Incident, and increasingly after the inmates' private investigator sought to interview Fairley, both Respondents experienced pervasive and unrelenting harassment by Petitioners and other officers and supervisors. R.686 at 7-8. In addition to frequent incidents of verbal harassment, Petitioners Bercasio and Fermaint forcefully attempted to and did "dry hump" Fairley and Gackowski, seizing them from behind and simulating anal intercourse. R.553-6 at ¶¶254-256, 262;

R.686 at 8. Bercasio repeatedly drew vile pornographic cartoons of Gackowski, which were posted on bulletin boards. R.553-6 at ¶¶257-260. Petitioner Byrne repeatedly gave Fairley dangerous and undesirable assignments to the SI-2 Unit, which houses the most dangerous and violent inmates. R.553-6 at ¶¶213-214, 216-221; R.686 at 7. During these assignments, Bercasio and Fermaint repeatedly refused to unlock the security door to SI-2 to allow Fairley out to use the restroom, and provided Fairley with insufficient food and other supplies for SI-2 inmates, which provoked the inmates' rage against Fairley. R.553-6 at ¶¶251-253; R.686 at 7.

In addition to this conduct, Petitioners threatened Fairley and Gackowski with physical violence. In November 2002, Petitioner Coffey told Fairley: "You know, in the old days when we used to work here, an officer filed a complaint on another officer – or told on another officer – you'd usually get met in a parking lot." R.553-6 at ¶¶320-322. More menacing was an incident which began on December 20, 2002, when an SI-2 inmate attacked Fairley and cut him on the wrist with a shank. R.553-6 at ¶¶337, 347-349; R.668 at 10. Within a week of this attack, Bercasio told Fairley, "You see that, Fairley? You fuck with people, that's how you get stabbed." R.553-2 at ¶¶377-381. On January 7, 2003, ten days before Fairley was deposed in the *Fields* Litigation, Petitioner Prohaska approached Gackowski and asked him, "What's up with your buddy Fairley? Why is he trying to fuck us all? If Fairley goes into court on this SI-2 case from July 29, 2000 and tells the truth, he will fuck everyone involved." Gackowski asked Prohaska, "What's Fairley supposed to do? Lie for some idiots that got out of hand?" Prohaska then stated, "We always knew he

[Fairley] was a weak link and when a weak link can fuck everyone in the chain, then we have to bury the weak link. It's nothing personal. It's just business." R.553-2 at ¶384; R.686 at 11.

Following Prohaska's threat to "bury weak links,"Fairley and Gackowski went to the Internal Affairs Division ("IAD") to submit "Emergency Transfer Requests." R.553-2 at ¶¶403-405. Fairley's request stated:

> The R/O [reporting officer] on 17 Jan. 2003 gave a deposition under subpoena in a law suit [*sic*] concerning an incident that occurred on 29 July 2000 in Division One SI-2. In the R/O's sworn testimony, the R/O implicated several officers in wrongdoing one of whom was Lt. Byrne. Since this incident the R/O has been harassed and the R/O' [*sic*] life has been threatened. The harassment increased when it was known that the R/O was to give a deposition on 17 Jan. 2003. . . . The R/O requests a transfer to Chief Security and requests that Lt. Byrne be moved from that assignment.

R.553-2 at ¶¶408-409. Fairley told the Chief of IAD that there were some "bad people" working at the Cook County Jail and that he would not commit perjury for them. R.553-2 at ¶407. IAD never responded to Respondents' requests for transfers. Fearing for their safety, Fairley and Gackowski resigned their employment. R.553-2 at ¶420.

Fairley was deposed in the *Fields* Litigation on January 17, 2003, and testified about the numerous times he witnessed inmate abuse, including but not limited to the beating he witnessed during the SI-2 Incident and about Byrne's brazen encouragement of the beating. R.553-2 at ¶403; R.744-2 at ¶71; R.553-6 at ¶¶401-402; R.738 at Exhibits 8 and 9. One month later, on February 18, 2003, Gackowski was deposed in the *Fields* Litigation and testified about numerous incidences of inmate abuse that he had witnessed over the years and about Byrne's and Fermaint's admissions that they had beaten inmates during the SI-2 Incident. R.738 at Exhibit 12; R.744-2 at ¶72.

ARGUMENT

A. THERE IS NO SPLIT IN THE CIRCUITS BECAUSE THE COURT OF APPEALS' LEGAL HOLDING IS WELL-ESTABLISHED AND UNREMARKABLE.

This case does not warrant this Court's review. The essence of the panel opinion is that the "first amendment protects speakers from threats of punishment that are designed to discourage future speech." 578 F.3d at 525. There can be no legitimate dispute about this legal principle. Fairley and Gackowski are prepared to prove at trial that the Petitioners' conduct, in addition to being vile and illegal, was intended to intimidate them into silence so that they would not testify about the use of excessive force at the Cook County Jail.[3] As the

3. Petitioners repeatedly assert that their threats did not actually "prevent" Respondents from testifying in the *Fields* Litigation. *See, e.g.*, Pet. at 11. However, Respondents do not allege that Petitioners physically restrained them from getting to their depositions or the courthouse.

appellate court observed during the initial appeal in this case wherein certain of the Petitioners asserted qualified immunity: "It was clearly established long before the events of which plaintiffs complain that state actors may not assault witnesses in federal litigation. That's a crime, see 18 U.S.C. § 1512(a)(2), so no public official could think the conduct proper." *Fairley v. Fermaint*, 482 F.3d 897, 902 (7th Cir.)("*both* threats designed to deter future speech *and* penalties for past speech are forbidden") (emphasis added), *cert. denied*, 128 S. Ct. 181 (2007).

Petitioners contend that this case warrants review by the Court because it "impermissibly expands the reach of [the prior restraint] doctrine that this Court has heretofore expressly confined to state actions that rise to a 'legal impediment . . . to . . . expressive activity.'" Pet. at 7 (citations omitted). Petitioners' exaltation of form over substance is wrong as a matter of law and provides no basis for this Court to grant the writ.

Although prior restraint cases tend to arise in the context of formal "legal impediments" such as gag orders or written policies, there is no requirement for such in order to state a viable First Amendment violation. To the contrary, for well over forty-five years, this Court has recognized, for example, that "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

In *Bantam Books*, the Court observed it was not "the first court to look through form to the substance" of the prior restraint to determine its constitutionality. *Id.* at 67 n. 8 (collecting cases). The prior restraint in

Bantam Books took the form of a notice sent by a Rhode Island state agency to book distributors indicating that the agency was listing a specific book as "objectionable." *Id.* at 62. In response, distributors often cancelled orders from publishers and pulled the book off the shelves. *Id.* Like the Petitioners here, Rhode Island took the position that there was no prior restraint because there was no actual regulation suppressing obscene material. *Id.* This Court found Rhode Island's argument untenable, and struck down the practice as unconstitutional. *Id.* at 64. Contrary to Petitioners' contention, form never has triumphed over substance for purposes of an actionable prior restraint claim. *See also Baird v. State of Arizona*, 401 U.S. 1, 5-6 (1971) (although it did not prohibit speech, Arizona violated the First Amendment when it asked about Communist party membership prior to admission to the practice of law); *Ridpath v. Board of Governors*, 447 F.3d 292, 319 (4th Cir. 2006)(where University warned employee against commenting publicly on an NCAA investigation, employee's chilling claim is essentially a "derivative of a retaliation claim: if a public employee cannot fire, demote, or similarly punish a public employee for engaging in protected speech, the employer also cannot intimidate the employee into silence by threatening impermissible retribution."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999)(where a police officer's superiors threatened to terminate him if he engaged in protected speech, the court held, "a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment."); *Morris v. Lindau*, 196 F.3d 102, 113 (2nd Cir. 1999)(defendant's threat to discipline plaintiff employee if plaintiff spoke

out actionable as a prior restraint); *Aebisher v. Ryan*, 622 F.2d 651, 655 (2d Cir.1980) (court found cause of action existed for teacher who alleged principal's letter of reprimand in her file chilled right to speech because "First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech."); *Penthouse Internat'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1362 (5th Cir. 1980) (holding that an "informal system of prior restraint" is proscribed by the First Amendment).

With no legitimate basis to request review by the Court, the Petitioners attempt to analogize the prior restraint here (harassment and death threats and ultimate constructive discharge) to the *unenforced* provisions of the Hatch Act challenged in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). The *Mitchell* plaintiffs, who had neither engaged in political work nor been sanctioned under the Hatch Act, requested a declaration that certain provisions of the Act were unconstitutional. The Court found that plaintiffs failed to present a justiciable case or controversy because a "hypothetical threat is not enough."[4] *Id.* at 89-90. Respondents do not quibble with the holding of *Mitchell*, but for Petitioners to compare the harassment that Respondents endured at the hands of the Petitioners from the time the inmates' lawsuit was filed until they were constructively discharged to the "hypothetical threat" at issue in *Mitchell* is wholly unpersuasive and cannot give rise to a basis for this Court to grant certiorari in this case.

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4. During the seven years this case has been pending, Petitioners have never challenged the jurisdiction of the federal courts to hear the controversy.

The Petitioners also rely on *Alexander v. United States*, 509 U.S. 544 (1993), to attempt to persuade this Court that the appellate court overstepped its authority by holding that the harassment at issue here could constitute an actionable prior restraint. The Petitioner in *Alexander* argued that a RICO-based forfeiture of assets "operates as a prior restraint because it prohibits future presumptively protected expression in retaliation for prior unprotected speech." *Id.* at 549-550. The Court refused to "stretch the term 'prior restraint'" in this context where the forfeiture order did not forbid speech, but, based on a criminal conviction, seized assets from the convict. *Id.* Unlike the wholly inapposite forfeiture order in *Alexander*, Fairley and Gackowski stand ready to prove that the threats and harassment in this case were intended to deter their future constitutionally protected speech. Though Petitioners may argue to the jury that the harassment did not take place or that it was not intended to deter Respondents' speech, those issues are of no concern to this Court. It is well-past time for Respondents to have an opportunity to prove their case to a jury. Certiorari should be denied.

CONCLUSION

The holding in this case, while significant to both the Petitioners and the Respondents, falls far short of presenting any compelling reason for this Court's review. Respondents respectfully request this Court to deny the petition for certiorari.

Respectfully submitted,

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Petitioners,

v.

ROGER FAIRLEY AND RICHARD GACKOWSKI,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION[1]

Respondents characterize the Seventh Circuit opinion underlying this Petition as "unremarkable" – re-casting the holding as a narrow one implicating First Amendment protection for "truthful testimony." Were it so, the opinion would still be remarkable to the extent it makes actionable – under the First Amendment – harassment alleged to have been directed at "discouraging" *future* "truthful testimony" (as opposed to "retaliating" against someone for their past "truthful testimony").

But the Seventh Circuit opinion is – explicitly – neither limited to trial testimony, nor to "truthful testimony." It is, instead, cast much more broadly, holding that "[t]he first amendment protects speakers from threats of punishment that are designed to discourage *future speech*." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (emphasis added). And holds further that the Respondents may "recover from any defendants" who made such "threats of punishment." Id.

Notwithstanding Respondents' contention that this holding is "obvious" "unremarkable," and putatively "based in well-established law" they have failed to cite a single case – from this Court or any other – that stands for remotely the same propositions.

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[1] Respondents' Brief in Opposition includes a "Statement of the Case," recounting, in some detail, the supposed misconduct that was the eventual subject of the Respondents' trial testimony. The "Statement" omits the fact that a Cook County jury rendered a defense verdict necessarily rejecting the Respondents' testimony (See Sec III(B), infra).

The Petition should be granted. The decision below is unprecedented in the most literal sense -- importing the doctrine of "prior restraint" into claims for "First Amendment retaliation" -- and thus deciding an important question of law that should be addressed by this Court. Moreover – notwithstanding Respondents' contention to the contrary – the basis of the opinion does evidence a circuit split in need of this Court's resolution. Either ground is sufficient to justify the grant of the Petition under Supreme Court Rule 10(a).

I. None of the Cases Cited by the Respondents Supports the Contention that the Opinion is "Obvious, Unremarkable" and "Based on Well-Established Law"

Respondents contend that "[a]lthough prior restraint cases tend to arise in the context of formal 'legal impediments' such as gag orders or written policies, there is no requirement for such in order to state a viable First Amendment violation." (Brief in Opposition at pp 7). Requiring Respondents to fit their claim of a "First Amendment violation" into the elements established for a claim of "prior restraint" is, according to the Brief in Opposition, an "exaltation of form over substance" that is "wrong as a matter of law." Id.

Respondents attempt to shun the categorization of their claim as involving a "prior restraint" in favor of something they would prefer to be termed a "First Amendment violation" is improper. They cannot now treat the relevant issue as anything *other than* one involving the doctrine of prior restraint for at least two reasons. First, they *invited* the Seventh Circuit opinion reversing summary judgment in favor of the

defendants "to the extent that [the district court] dismissed the prior restraint claim" (*Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009)), And second, since the Petition for Certiorari was docketed, the Respondents have sought and obtained leave to file a Third Amended Complaint in which the only substantive cause of action is now *captioned* "Count I: Deprivation of First Amendment Rights Under § 1983 (PRIOR RESTRAINT)" (Appendix at 1a – 26a).

For one or both of those reasons, Respondents are judicially estopped from arguing that the issue is anything other than one directly involving a claim of prior restraint. See e.g. *State of New Hampshire v. State of Maine*, 532 U.S. 742, 749 (2001).

Respondents' attempt to re-characterize their claim would seem to be a transparent effort to avoid this Court's holding in *Alexander v. United States*, 509 U.S. 544 (1993), which runs directly counter to the position they espouse in the Brief in Opposition and requires the subject government action impose a formal "legal impediment . . . on petitioner's ability to engage in expressive activity" or require him "to obtain prior approval for any expressive activities" in order to rise to an unconstitutional prior restraint. *Alexander*, 509 U.S. at 550. Respondents distinguish *Alexander* on its facts, as involving a "wholly inapposite forfeiture order" (Brief in Opposition at pp 10) and instead argue that this Court has approved "look[ing] through form to substance" in a general sense that would apparently forgive them from establishing the elements of a recognized First Amendment claim.

Respondents cite *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) – for the explicit proposition that

"informal censorship" can rise to an unconstitutional level and the implicit proposition that the doctrine of "prior restraint" is, thus, not confined in application to formalized restrictions on speech.

Bantam Books involved a creature of the Rhode Island state legislature designated the "Rhode Island Commission to Encourage Morality in Youth." The Commission took it upon itself to send notices to book distributors stating that it had been charged with "prevent[ing] the sale, distribution or display of indecent and obscene publications" and that lists of "objectionable" publications were being circulated to local Chiefs of Police with the order that "they are not to be sold, distributed or displayed to youths under the eighteen years of age." 372 U.S. at 63 n. 5.

Justice Brennan, writing for the majority, found that the notices were "phrased virtually as orders," and that the "blacklists" of publications "*plainly serve as instruments of regulation* independent of the laws against obscenity." Id. at 68 (emphasis added). The Court further found that the Commission's operation was itself "*a form of effective state regulation* superimposed upon the State's criminal regulation of obscenity," (Id. at 69) (emphasis added) terming it a "system of prior administrative restraints" (Id. at 70) and a "system of informal censorship." Id. at 71.

Given the context, "informal," as used in *Bantam Books*, means nothing more than "extra-legislative." The "informal censorship" referenced by the Court was a "*system* of informal censorship" that the Court expressly found to have been the functional equivalent of state regulation. *Bantam Books* cannot be said to support the proposition that Respondents forward as

"well-established": that "look[ing] through the form to the substance" permits *any* "informal" state action that could affect constitutionally-protected speech to be potentially treated as unconstitutional.

The only other Supreme Court case that Respondents cite as support for their claim that the opinion below is "based on well-established law" is *Baird v. State of Arizona*, 401 U.S. 1 (1971). *Baird* concerned the constitutionality of an Arizona Bar Committee question requiring applicants to "state whether [they] had ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence." *Baird*, 401 U.S. at 4-5. The Court held that inclusion of the question violated the First Amendment right of freedom of association. Id. at 7.

The Court did not address the doctrine of prior restraint directly or indirectly in *Baird*. And Respondents have not attempted to characterize their claim as involving one impacting freedom of association.

None of *Ridpath v. Board of Governors*, 447 F.3d 292 (4th Cir. 2006); *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999), or *Aebisher v. Ryan*, 622 F.2d 651 (2nd Cir.1980), so much as address the issue of prior restraint. And neither do the two remaining cases cited by the Respondents support the position that the opinion is "based on well-established law."

In *Penthouse Int'l, Ltd. v. Mcauliffe*, 610 F.2d 1353 (5th Cir. 1980), the Fifth Circuit found a County Solicitor General's "calculated scheme of warrantless arrests and harassing visits to retailers" selling adult

magazines constituted a "constructive seizure" of the magazines, and, thus, an unconstitutional "informal system of prior restraint" justifying an injunction. 610 F.2d at 1361. And in *Morris v. Lindau*, 196 F.3d 102 (2nd Cir. 1999), the Second Circuit acknowledged that a prior restraint can only legally exist "where the government imposes a requirement of advance approval or seeks to enjoin speech . . ." *Morris v. Lindau*, 196 F.3d at 113 (quoting *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1543 (2nd Cir. 1991)).

II. The Opinion Evidences a Circuit Split

Respondents argue that there is "no split in the Courts of Appeal on the legal issue raised in [the] Petition." (Brief in Opposition at pp 1) But the Seventh Circuit opinion arises, at bottom, from the broadest possible view of "First Amendment Retaliation" in the context of a public employment setting. And to the extent the opinion can be read as expanding that "constitutional tort" (instead of creating a new one based in "prior restraint"), it serves to highlight an important circuit split, the resolution of which would be necessary to constrain the growing sprawl of public employment-related federal litigation.

In cases involving a claim of "First Amendment Retaliation" in a public employment context, the Seventh Circuit – as well as the Fourth and Ninth Circuits – require only that the offending conduct rise to the level of that "reasonably likely to deter" First Amendment-protected speech or activity. See e.g. *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000); *Coszalter v. City of Salem*, 320 F.3d 968 (9th

Cir. 2003). By contrast, four other circuits – the First, Fifth, Eighth and Eleventh – require the offending conduct to effect a substantive "adverse employment action" akin to that required by Title VII in order to be actionable. See e.g. *Acosta-Orozco v. Rodriquez-de-Rivera*, 132 F.3d 97, 101 n. 5 (1st Cir. 1997) ("unreasonably inferior" test); *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 580 (5th Cir. 2003) ("adverse employment action"); *Meyers v. Starke*, 420 F.3d 738, 744 (8th Cir. 2005) (same); *Stavropoulos v. Firestone*, 361 F.3d 610, 619 (11th Cir. 2004) (action affecting "important condition of employment").

Ultimately, the circuit split turns on the question of justiciability. Under *Bart v. Telford*, and its progeny, the lower boundary of a First Amendment retaliation claim is formed by the doctrine of *de minimis non curat lex* and "actionability under section 1983" is a "question of fact" to be determined by a jury. See *Bart*, 677 F.2d at 625. The countervailing view holds that the court must determine in the first instance whether a First Amendment retaliation plaintiff has a cognizable injury by applying a standard analogous to that required by Title VII.[2]

In the end, the justiciability of a First Amendment retaliation claim should not effectively continue to be a "question of fact" to be decided by a jury – as it has become in the Seventh, Fourth and Ninth Circuits. Justiciability should instead be treated as a threshold

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[2] The circuit split has been the subject of recent commentary. *See* Bohn, Elizabeth J., *Put On Your Coat, A Chill Wind Blows*, 83 Denv. U. L. Rev. 867 (2006), Berger Levinson, Rosalie, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims*, 79 TUL. L. REV. 669, 694 (2005).

question of law to be decided by the court. This Court should resolve the circuit split in favor of the test applied by the First, Fifth, Eighth and Eleventh Circuits.

III. The Respondents' Formulation of the "Question Presented" is Misleading

Respondents have formulated their own "Question Presented" that is misleading in at least two different respects. First, the Respondents' "Question Presented" suggests that the Seventh Circuit found that the alleged "threats of physical violence and battery" were, in fact, made "under color of law." And second, the "Question Presented" implies that there has been some kind of holding that the Respondents' trial testimony was "truthful."

The opinion below did not analyze the whether the claimed harassment occurred "under color of law" and neither predicated its holding on the supposed "truthful" nature of the "future speech" at issue or held that the Respondents' testimony was "truthful" in fact.

A. The Alleged "Harassment" Cannot Be Presumed to Have Occurred "Under Color of Law"

Acting "under 'color' of law means under 'pretense' of law." *Screws v. U.S.*, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040 (1945). And "acts of officers in the ambit of their personal pursuits are plainly excluded." *Screws*, 325 U.S. at 111, 65 S.Ct. at 1040.

Both the Respondents, as well as the Petitioners, were employed in a law enforcement capacity by the

Cook County Department of Corrections. But the fact that the allegations concern actions that occurred while each of the parties were in uniform and on duty has little bearing on a proper analysis of whether the alleged acts occurred "under color of law." "[W]hether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). "The key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law." *Id.*

In *Martinez*, a police officer sued various of his fellow officers on Constitutional grounds after one of the defendants accidentally discharged his firearm, maiming him. Entering summary judgment on the constitutional claims, the First Circuit held that the "tormenting an acquaintance" while "reprehensible" was not "action under color or pretense of law" because plaintiff had not produced any evidence tending to show that the plaintiff's tormentor – even when brandishing his gun – was exercising or purporting to exercise police power.

So too the situation giving rise to this Petition. Contrary to the implication in Respondents' formulation of the "Question Presented," it cannot be presumed simply by virtue of the fact that Petitioners were all uniformed officers, that the Respondents were led to believe that they were "acting with the imprimatur of the state." The allegations of harassment at issue here are wholly unrelated to the performance of the defendant officers' duties as state employees. The complained of interactions arise

merely from proximity – not any type of state-conferred powers. By their very nature, they are "private acts" rather than acts taken "under color of state law."

B. Respondents' Trial Testimony Cannot Be Preumed to Have Been "Truthful" Given the Fact that a Twelve-Person Jury Rejected It.

Respondents' claim centers on their trial testimony on behalf of the plaintiffs in *Fields v. Byrne,* No. 00 L 9339 (Cir. Ct. Cook County filed Aug. 16, 2000). But on June 3, 2005, a twelve-person jury entered a verdict in favor of the *defendants* in that case, including Petitioners Lt. Edward Byrne and Correctional Officers Evan Fermaint and Norberto Bercasio, and *against* the plaintiffs, who claimed – consonant with Respondents' testimony -- that they were "beat[en]" by the defendants on July 29, 2000. (Appendix at 27a).

The Seventh Circuit opinion notes that ""[t]he jury returned a defense verdict," (*Fairley*, 578 F.3d at 521), but fails to analyze the obvious impact of that defense verdict on the Respondents' claim. The defense verdict is necessarily fatal to Respondents' claims because – as Respondents implicitly acknowledge – the Constitution can only be said to protect *truthful* trial testimony. This Court's precedent is clear: "There is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). And neither "the knowingly false statement" nor the "false statement made with reckless disregard of the truth" "enjoy constitutional protection" *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

The *Fields* jury could not have credited either Fairley or Gackowski's trial testimony as "truthful" and entered a verdict for the defendants in that case. And Respondents have no First Amendment claim, as a matter of law, arising from allegations related to trial testimony rejected by a jury as incredible.

CONCLUSION

Despite Respondents' contentions to the contrary, the opinion below is remarkable in several respects. The opinion below effectively eliminates the temporal component of "retaliation," permitting public employee/plaintiffs to pursue causes of action for anything they subjectively feel is constraining them from saying something or doing something constitutionally-protected in the future. This formulation places potential defendants in the impossible position of having to know, in advance, what the prospective plaintiffs might desire to say or do in the future so as not to be accused of preventing them from saying or doing it.

Secondly – and entirely apart from the temporal issue – the opinion does not limit the field of potential defendants to the plaintiffs' employers or supervisors. Without analysis, it makes actionable – for the first time – claims of First Amendment-based "harassment" by and between co-equal employees. The decision has the effect of broadening the pool of potential First Amendment retaliation litigants along two different axes. It would both permit public sector employees aggrieved by some act committed by their co-equals to become plaintiffs; and allow non-supervisory public sector employees to be named as defendants. The geometric increase in the number of potential First

Amendment retaliation litigants will inexorably lead to a geometric increase in First Amendment retaliation-based litigation.

The opinion, which stands to affect hundreds of thousands of Seventh-Circuit-based public-sector employees, has the same potential to do for the law of "First Amendment retaliation" what *Monroe v. Pape*, 365 U.S. 167 (1961) did for Section 1983 law, generally – transforming a relatively seldom seen claim into "one that pours into the federal courts tens of thousands of suits each year" and contributes further to the "losing struggle to prevent the Constitution from degenerating into a general tort law." *Crawford-El v.Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting),

For all the reasons set forth herein, the Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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April 29, 2010

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 03 C 5207

[Filed February 22, 2010]

ROGER FAIRLEY and RICHARD GACKOWSKI,

Plaintiffs,

v.

DENNIS ANDREWS; EDWARD BYRNE; EVAN FERMAINT; NORBERTO BERCASIO; FRED COFFEY; RONALD PROHASKA; SAUL WEINSTEIN, in their individual capacities; and THE SHERIFF OF COOK COUNTY, ILLINOIS, and COOK COUNTY, ILLINOIS for indemnification purposes.

Defendants.

Judge Amy St. Eve

THIRD AMENDED COMPLAINT

Nature of the Case

1. This is a case about two individuals who did the right thing. Instead of being commended, they were harassed, threatened, intimidated, and forced out of their jobs. Plaintiffs Roger Fairley and Richard Gackowski have been deprived of their basic civil rights by government officials whose duties include upholding the law and protecting the civil rights of others. Plaintiffs bring this Complaint pursuant to 42 U.S.C. § 1983 to redress violations of their rights under the First and Fourteenth Amendments of the United States Constitution. Plaintiffs, former Cook County correctional officers (guards at the Cook County Jail), repeatedly witnessed, spoke out and opposed numerous inmate beatings, and refused to participate in the wide-spread and accepted practice at the Cook County Jail of allowing and concealing the use of excessive force by correctional officers on inmates. In response, the Defendant correctional officers and others harassed Plaintiffs. In August 2000, several inmates filed a well-publicized lawsuit regarding a series of beatings by correctional officers at the Jail ("the *Fields* litigation"). In an attempt to prevent the Plaintiffs from testifying truthfully in this case about their knowledge of the use of excessive force by correctional officers, Defendants and other correctional officers engaged in concerted action aimed at discouraging Plaintiffs from testifying truthfully in the *Fields* litigation. Defendants' harassment, which culminated in threats of bodily harm against Plaintiffs, was extreme and outrageous. This campaign of harassment seriously injured Plaintiffs and constituted a violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

Parties

2. Plaintiff Roger Fairley is a citizen of the United States and a resident of the Northern District of Illinois. From October 31, 1994 to February 4, 2003, Plaintiff Fairley was employed at the Cook County Department of Corrections ("CCDOC") as a correctional officer.

3. Plaintiff Richard Gackowski is a citizen of the United States and a resident of the Northern District of Illinois. From June 12, 1995 to February 4, 2003, Plaintiff Gackowski was employed at the CCDOC as a correctional officer.

4. Since approximately August 2000, and at all times pertinent to the allegations of this complaint, Defendant Dennis Andrews was the Superintendent of Division One. He is sued in his individual capacity for acts under color of law.

5. At all times pertinent to the allegations of this complaint, Defendant Edward Byrne was a correctional officer holding the rank of Lieutenant with the CCDOC. He is sued in his individual capacity for acts under color of law.

6. At all times pertinent to the allegations of this complaint, Defendant Evan Fermaint was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

7. At all times pertinent to the allegations of this complaint, Defendant Norberto Bercasio was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

8. At all times pertinent to the allegations of this complaint, Defendant Fred Coffey was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

9. At all times pertinent to the allegations of this complaint, Defendant Ronald Prohaska was a correctional officer with the CCDOC. He is sued in his individual capacity for acts under color of law.

10. Defendant Saul Weinstein was the Chief Investigator of the Internal Affairs Division ("IAD") from at least May 2001 until late 2002. He is sued in his individual capacity for acts under color of law.

11. Defendant Sheriff of Cook County, Illinois has entered into a binding stipulation that he will pay from public funds any and all compensatory or actual damages, costs and attorneys' fees which are awarded to Plaintiffs against or agreed to as part of any settlement with any Defendant. Accordingly, the Sheriff of Cook County is maintained as an indemnification party to Count II of this complaint.

12. Defendant Cook County is empowered and directed to pay any tort judgment for compensatory damages (and associated attorneys' fees and costs) for which the Sheriff or an employee acting within the scope of his employment is found liable. Accordingly, Cook County is also maintained as an indemnification party to Count II of this Complaint.

Jurisdiction and Venue

13. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(1), and

1367(a). Venue is established under 28 U.S.C. § 1391(b), because the events giving rise to these claims occurred in Cook County, Illinois, and some or all of the Defendants reside in Cook County, Illinois.

Factual Allegations[1]

Background

14. The CCDOC's main facility ("Cook County Jail") is located at 2700 South California Avenue in Chicago, Illinois. The CCDOC is organized into eleven separate Divisions, housing approximately 12,000 men and women. Each Division is located in a separate facility, and is under the supervision of a Divisional Superintendent. Division One is located in the oldest of the eleven facilities at CCDOC and houses approximately 1,200 male inmates.

15. Special Incarceration Unit Two ("SI-2") is located in the basement of Division One. It is one of two units that housed inmates designated as "special incarceration" inmates because they are considered to be extremely dangerous or serious escape risks as a result of having been charged in high profile criminal cases have been involved in violence while in jail, or are otherwise determined to require special incarceration treatment. SI-2 houses many of the most dangerous and difficult inmates held at Cook County Jail, and therefore is among the most dangerous and difficult places for a correctional officer to work within the jail.

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[1] All facts alleged herein pertain to the time period of 1994-2003, inclusive.

16. Plaintiff Fairley graduated from the CCDOC Training Academy on January 27, 1995. Upon graduation, he began working for the CCDOC as a correctional officer at the Cook County Jail. He was initially assigned to the midnight shift in Division One. In 1997, Plaintiff Fairley was assigned to the 7 a.m. to 3 p.m. shift in Division One.

17. Plaintiff Gackowski graduated from the CCDOC Training Academy on August 25, 1995. Upon graduation, he began working for the CCDOC as a correctional officer at the Cook County Jail. He was initially assigned to Division Five under the supervision of Defendant Andrews and others. Having witnessed repeated instances of the excessive use of force in Division Five, Gackowski sought and received a transfer to Division One. In Fall 1997, he was assigned to the 3 p.m. to 11 p.m. shift in Division One. In Fall 1998, he was assigned to the 7 a.m. to 3 p.m. shift in Division One, the same shift and division to which Plaintiff Fairley was assigned.

18. In approximately early 1999, shortly after Gackowski was assigned to the day shift in Division One, Plaintiffs Fairley and Gackowski met and became best friends. It became well known among their superiors and fellow officers in Division One that Plaintiffs Fairley and Gackowski were very close friends.

19. Over the years that they worked at the Jail, by their words and actions, Plaintiffs repeatedly made it clear to their supervisors and fellow correctional officers in Division One that they were opposed to and would neither condone nor conceal the beating and abuse of inmates, and that they would not cooperate in

any subsequent cover-ups of such incidents by other correctional officers. Plaintiffs witnessed numerous incidents of the use of excessive force on inmates, and repeatedly voiced their objections to such incidents and made it known that they would not participate in such behavior. For example:

a) Both Plaintiffs, while cadets in the Training Academy, witnessed the use of excessive force against inmates, and when they voiced objections to their training instructors, they were told not to inform on their fellow officers.

b) In December 1998, Plaintiff Fairley witnessed Defendant Coffey and another correctional officer two inmates, David Cruz and Norberto Ortiz. Plaintiff Fairley spoke against it and reported the beating to two supervisors. Defendant Byrne filed a false report about the incident and was later named along with Defendant Coffey as a defendant in a lawsuit brought by the two inmates.

c) On April 1, 2000, Plaintiff Gackowski witnessed Defendant Coffey beat up inmate Rodney Brown. Gackowski yelled at defendant Coffey to stop beating the inmate and told Defendant Coffey that his actions toward inmate Brown were uncalled for.

d) On January 15, 2000, Fairley saw Defendant Prohaska beating a shackled inmate, Earl Faber. Plaintiff Fairley yelled at Prohaska to stop. Another SI-2 inmate, Nathson Fields,

helped Faber draft a complaint which was then sent to outside correctional reform advocates, triggering an IAD investigation. Prohaska later admitted his involvement in the incident to Plaintiff Gackowski.

e) On May 9, 2000, Defendant Byrne and another correctional officer beat SI-2 inmate George Fernandez. Correctional Sgt. Arthur Perry tried to stop the beating and, later, reported this excessive force to IAD. Word quickly spread through the Division One day shift that Sgt. Perry had "ratted out" Defendant Byrne. Byrne was de-deputized, and ordered transferred out of the Division (which order was never carried out). When Sgt. Perry was subjected to a steady stream of ridicule and abuse by many Division One officers, Plaintiffs Fairley and Gackowski made it known that they admired Perry for what he did.

f) In the latter half of 2001, Plaintiffs Fairley and Gackowski both witnessed Defendant Byrne beat inmate Alpacino Lewis as Defendant Prohaska and other correctional officers watched and cheered Byrne on. Both Plaintiffs expressed their opposition to this abuse while in the presence of Defendants Byrne and Prohaska and other officers.

g) In late 2001 or early 2002, Plaintiff Gackowski witnessed Defendant Coffey and another correctional officer beat several inmates who had been fighting, while Defendants Byrne and Andrews and several

other correctional officers stood by watching. Gackowski expressed his opposition to this abuse and condonation of abuse.

h) In 2001 or 2002, Plaintiff Gackowski witnessed Defendant Fermaint and two other correctional officers beat two inmates in an area called the Post 78 pump room. Plaintiff Gackoswki refused to participate in this abuse, and walked away in disgust.

i) In late 2001 or early 2002, Defendant Byrne and Plaintiff Gackowski observed three correctional officers taking turns slapping an inmate. Defendant Byrne laughed. Plaintiff Gackowski looked at Defendant Byrne, shook his head in disgust, and left.

j) In early 2002, both Plaintiff Fairley and Gackowski witnessed Defendant Byrne repeatedly slap an inmate who was handcuffed to a pole in the Post 78 pump room. When the inmate protested, Defendant Byrne responded: "I could f***in' kill you and get away with it as long as my paperwork is straight."

k) On June 7, 2002, Plaintiff Fairley, Defendant Coffey and another correctional officer subdued and handcuffed a delusional inmate, Vennis McCall. After the inmate was restrained, Defendant Coffey and the other correctional officer beat the inmate. At the end of the shift, Defendant Coffey, in front of most of the day shift officers, bragged about their conduct. Plaintiff

Fairley then spoke up and revealed that Defendant Coffey and the other correctional officer had beaten the inmate after he was subdued.

20. On July 29, 2000, Plaintiff Fairley observed Defendants Fermaint and Bercasio, along with Officers Griffin and Bonarek, violently beating inmates Nathson Fields and others in and near the SI-2 Unit (the "SI-2 Incident"). Fields was a "jailhouse lawyer" who had helped inmate Faber expose the January 15, 2000 beating in SI-2. Plaintiff Fairley yelled at the Defendants Fermaint and Bercasio and the other correctional officers to stop beating the inmates and warned the officers that they were going to kill the inmates if they did not stop. Defendant Byrne also witnessed the beatings, heard Fairley's efforts to stop them, and urged the officers to continue.

21. On July 29, 2000, Plaintiff Gackowski was present in the Division Eight Emergency Room when some of the individuals that were injured during the SI-2 Incident were brought in for treatment. Plaintiff Gackowski observed that inmate Scott was lying listlessly on a stretcher. He saw that inmate Scott's face was swollen and bleeding.

22. Shortly after the SI-2 Incident, Plaintiff Fairley asked Defendant Byrne if he should write an Incident Report. Defendant Byrne told Plaintiff Fairley not to write a report because investigators from IAD would be taking statements from all of the individuals that were involved in the incident. As had consistently been the case with regard to all of the use of excessive force Plaintiffs Fairley and Gackowski had witnessed,

no representative from IAD ever took a statement from Plaintiff Fairley regarding the SI-2 Incident.

23. Sometime between July 29, 2000 and August 5, 2000, Plaintiff Fairley told Plaintiff Gackowski everything that Fairley had observed during the SI-2 Incident.

24. In early August 2000, Defendant Byrne told Plaintiff Gackowski that during the SI-2 incident, he (Byrne) had twisted and jumped on the leg of one of the inmates in an attempt to break it, but he could not get it to "snap." Defendant Fermaint also told Plaintiff Gackowski that he had beaten up inmate Scott. Shortly thereafter, Gackowski told Plaintiff Fairley what he (Gackowski) had been told by Defendants Byrne and Fermaint.

25. On August 16, 2000, inmates, including three of the four inmates that Plaintiff Fairley had observed being beaten and who were represented by the McArthur Justice Center of the University of Chicago Law School, filed a suit in the Law Division of the Circuit Court of Cook County, Illinois, entitled, *Fields, et al. v. Velasco, et al.*, No. 00 L 0009339 (the "*Fields* litigation"). Named as defendants in the lawsuit initially were Defendants Byrne and Fermaint, as well as CCDOC Executive Director Ernesto Velasco, Division I Superintendent James Edwards, and fifteen other officers and supervisors. Eighteen (18) of the fifty-two (52) officers and supervisors who were working the day shift in Division One on July 29, 2000 were named as defendants.

26. The *Fields* plaintiffs alleged that the beating of the SI-2 inmates on July 29, 2000 was premeditated

use of excessive force, directed by Defendant Byrne, in retribution for: the involvement of SI-2 inmates Fields and Faber in reporting the misconduct of Defendants Byrne, Prohaska and others in the beating of Faber on January 15, 2000; and the involvement of numerous SI-2 inmates in providing statements that Defendant Byrne and correctional officer Boston had beaten SI-2 inmate George Fernandez on May 9, 2000 (the beating which Sgt. Perry had attempted to stop and reported to IAD).

27. Shortly after the suit was filed, the legal team at the McArthur Justice Center received information that led them to believe that Plaintiff Fairley had witnessed the July 29, 2000 Incident as well as other incidents of excessive force, and that he might be willing to testify truthfully about these matters.

28. After the *Fields* lawsuit was filed, Plaintiffs Fairley and Gackowski made known to their fellow correctional officers that they would tell the truth if asked about what they had seen or heard regarding the SI-2 Incident. In light of their history of opposing and speaking out against the abuse of inmates, the defendants feared that plaintiffs would testify about what they knew about the many incidents of abuse at the Cook County Jail.

Defendants Harass Plaintiffs Fairley and Gackowski in an Attempt to Discourage Them from Providing Truthful Testimony in the *Fields* Litigation.

29. Following the filing of the lawsuit by the inmates injured in the July 29, 2000 SI-2 incident,

Defendants engaged in a series of deliberate and concerted actions in an effort discourage Plaintiffs Fairley and Gackowski from testifying truthfully about the many incidents of excessive force they had witnessed and were aware of at the Cook County Jail. Those actions included the following.

30. For the first months following the July 29, 2000 SI-2 incident, the correctional officers who were involved in that incident were assigned to the SI-2 Unit. Thereafter, Defendant Byrne repeatedly assigned Plaintiff Fairley to work in difficult, dangerous and stressful assignments, including in SI-2. Defendant Byrne also repeatedly ignored Plaintiff Fairley's requests to be rotated out of SI-2. Defendant Byrne's actions were also in violation of CCDOC policy.

31. Defendant Andrews was responsible for overseeing the Division One assignment and in violation of policy, took no action to ensure that Plaintiff Fairley's assignments were being rotated properly.

32. Defendants Fermaint and Bercasio harassed Plaintiff Fairley by, among other things:

a) Repeatedly refusing to allow Plaintiff Fairley to leave SI-2 in order to use the restroom;

b) Repeatedly refusing to provide Plaintiff Fairley with supplies requested by inmates, knowing that the inmates would become angered and subsequently take their anger out on Plaintiff Fairley;

c) Repeatedly swearing at Plaintiff Fairley and calling him "social worker" or "inmate lover"; and

d) Repeatedly grabbing Plaintiff Fairley from behind and imitating sexual acts upon him at roll call or during work hours.

33. On March 7, 2001, a private investigator working with the *Fields* litigation legal team went to Plaintiff Fairley's home and attempted to interview him. Plaintiff Fairley, fearful because this meant that the SI-2 inmates knew where he, his wife and young children lived, denied having any knowledge and refused to be interviewed.

34. The next day, Fairley complained to Defendant Andrews, the Division One Superintendent, that an investigator for the SI-2 inmates who were plaintiffs in the *Fields* litigation had found out where Fairley lived and tried to question him. Shortly thereafter, legal counsel to the Sheriff of Cook County issued a letter to all of the correctional officers on the day shift in Division One, informing them that their home addresses had all been turned over to the judge presiding over the *Fields* litigation, that the lawyers for the inmate-plaintiffs in the *Fields* case could contact them through the judge, and that the correctional officers had discretion whether to talk to the inmates' lawyers. The letter issued by the Sheriff's legal counsel was a widely discussed matter of concern to the correctional officers in Division One.

35. On February 25, 2002, the plaintiffs' lawyers in the *Fields* litigation issued a subpoena to Plaintiff Fairley to appear for his deposition on April 18, 2002.

The subpoena was sent to the defense lawyers representing Defendants Byrne and Fermaint and others in the *Fields* litigation and to the Legal Office at CCDOC, but was never served on Plaintiff Fairley. On information and belief, Defendants Andrews, Byrne and others became aware of the Fairley deposition subpoena shortly after CCDOC's Legal Office received it. The fact of this subpoena was concealed from Plaintiff Fairley for over nine months.

36. Thereafter, Defendant Byrne took further actions to harass and silence Plaintiff Fairley. In addition to continuing to repeatedly assign Plaintiff Fairley to SI-2 and other undesirable assignments, Defendant Byrne, among other things:

a) Improperly denied Plaintiff Fairley paternal leave after the birth of his youngest child; and

b) Improperly denied Plaintiff Fairley his requests to be paid for overtime already worked.

37. On December 9, 2002, Chief Theisen (the Chief of Division One) sent Plaintiff Fairley a written memorandum informing Plaintiff Fairley that he would be deposed in a court ordered deposition in *Fields* litigation.

38. On December 20, 2002, while Plaintiff Fairley worked in SI-2, inmate Keon Lipscomb, without provocation by Plaintiff Fairley, attacked Plaintiff Fairley with a shank, cutting him on the right wrist. Defendant Bercasio precipitated the injury by tackling the armed inmate into Plaintiff Fairley. After

inmate Lipscomb was restrained on the floor, Plaintiff Fairley witnessed Defendant Byrne kick inmate Lipscomb in the mouth.

39. Before allowing Plaintiff Fairley to go to the Emergency Room for treatment, Defendant Byrne ordered him to complete his paperwork regarding the incident. Attempting to prevent Plaintiff Fairley from truthfully reporting the incident, Defendant Byrne ordered Plaintiff Fairley not to report that there was a weapon involved in the attack. Plaintiff Fairley's reports of the incident disappeared twice, and the shank with which inmate Lipscomb cut Plaintiff Fairley was not recovered.

40. On December 23, 2002, former Defendant Timothy Kaufmann[2], a Cook County Sheriff's Police investigator, assured Plaintiff Fairley that he would investigate and write a report of the stabbing incident by inmate Lipscomb and immediately forward the report to the Inspector General's Office. Kaufmann thereafter prepared a false report, and failed to complete his investigation so that the State's Attorney's office was unable to approve charges against Lipscomb.

41. The failure by certain individual Defendants to ensure that the incident was appropriately reported, investigated and charged significantly added to Plaintiff Fairley's distress and fear for his safety. By not charging inmate Lipscomb, these individual Defendants reinforced to Plaintiff Fairley that his

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[2] Kaufmann was dismissed as a defendant in response to the filing by his counsel of a notice that he died in October 2008.

fellow officers were not going to protect him and showed other inmates that they could attack Plaintiff Fairley without fear of criminal prosecution.

42. It was known among Plaintiff Fairley's supervisors and fellow officers that his deposition was rescheduled for January 17, 2003, and that once he was deposed, Plaintiff Gackowski's deposition would likely follow. As this date approached, the harassment and threats intensified in an attempt to silence Plaintiffs Fairley and Gackowski. From Fall 2002 until January 2003, Plaintiff Fairley was threatened on more than one occasion by certain Individual Defendants, including, but not limited to:

a) Defendant Coffey who warned Plaintiff Fairley in or about October or November of 2002 that officers who tell on other officers "usually get met in the parking lot";

b) Defendant Bercasio who warned Plaintiff Fairley on or about December 28, 2002 that he should not "fuck with people" because that is how you get stabbed;

c) Defendant Byrne who warned Plaintiff Fairley not to testify by telling him in late December 2002 that inmate Lipscomb would *falsely* state that Plaintiff Fairley beat him (inmate Lipscomb); and

d) Defendant Prohaska who threatened the lives of Plaintiffs Fairley and Gackowski on January 7, 2003. (*See infra* at ¶ 50)

43. In furtherance of the campaign of harassment aimed at discouraging Plaintiffs Fairley and Gackowski from testifying, on January 6, 2003, Defendant Byrne ignored Plaintiff Fairley's request for back-up help for him and Plaintiff Gackowski when a large group of inmates in the recreation room began acting in a manner that suggested a fight was imminent. Defendant Byrne told Plaintiff Fairley to let the inmates fight, a situation that would have placed Plaintiffs Fairley and Gackowski in grave danger.

44. Beginning in or about mid to late 2000, Defendants Fermaint and Bercasio began engaging in a wide-ranging campaign of harassment against Plaintiff Gackowski. The harassment included, but was not limited to:

a) Repeatedly drawing, posting and circulating cartoons and pictures depicting Plaintiff Gackowski in a sexually humiliating manner;

b) Repeatedly grabbing Plaintiff Gackowski from behind and imitating sexual acts upon him at roll call or during work hours;

c) Repeatedly making derogatory sexual comments about Plaintiff Gackowski's wife; and

d) Repeatedly swearing at Plaintiff Gackowski, calling him "social worker" or "inmate lover," and making derogatory sexual comments, such as "seal boy, come here and blow my horn."

45. On June 18, 2002, Plaintiff Gackowski filed a written complaint with the IAD regarding the harassment he was experiencing. On July 9, 2002, Plaintiff Gackowski filed another written complaint with IAD regarding the continual harassment by certain individual Defendants. Even though Defendant Andrews was one of the subjects of Plaintiff Gackowski's IAD complaints and IAD investigations were to be confidential, Defendant Weinstein sent Gackowski's complaint to Defendant Andrews. Defendant Andrews shared Plaintiff Gackowski's complaint with Defendant Byrne, and alerted all of the other officers involved in Gackowski's complaint that Plaintiff Gackowski had filed complaints against them. Defendants Andrews and Byrne then berated and threatened Plaintiff Gackowski for filing these complaints, including a threat by Defendant Andrews to sue him for slander. Thereafter Gackowski was involuntarily transferred to an undesirable assignment outside of Division One.

46. Defendant Weinstein, the Chief Investigator of IAD, was responsible for ensuring a prompt, effective and fair investigation of these complaints. Instead, he and IAD Investigator Gregory Ernst stalled the investigation for months. While in Division 5, Plaintiff Gackowski had witnessed Ernst and other correctional officers engage in the brutal beating of as many as 70 inmates. Ernst was the IAD investigator assigned to the case. He failed to interview any witnesses until January 15, 2003, seven months after Plaintiff Gackowski filed his first complaint with IAD, and five days after Plaintiff Gackowski reported Defendant Prohaska's death threat (*see infra* ¶ 60).

47. From Fall 2002 until his resignation, Plaintiff Gackowski suffered further harassment and adverse employment actions including, but not limited to, frequent harassing phone calls from Defendants Fermaint and Bercasio and other officers.

48. On January 7, 2003, Defendant Prohaska made death threats to Plaintiff Gackowski about both Plaintiff Gackowski and Plaintiff Fairley. Defendant Prohaska told Plaintiff Gackowski that they always knew Plaintiff Fairley was a weak link in the chain and that they were going to "bury the weak link." He then told Plaintiff Gackowski that he was "no better." Plaintiff Gackowski immediately informed Plaintiff Fairley about these threats, and they both concluded that it was no longer safe to work in Division One.

49. On January 9, 2003, Plaintiff Gackowski provided two written Memoranda to IAD Investigator Ernst, detailing the harassment and threats that he had experienced since November 2002. In these memoranda, Plaintiff Gackowski wrote that he believed that it was no longer safe to work in Division One and that he was in fear for his and his family's safety.

50. On January 10, 2003, Plaintiff Gackowski met with IAD Chief Frank Diaz, Investigator Ernst and two Sheriff's Police officers, Investigator Kenneth Raher, and Sgt. Ronald Zychowski, for the purposes of pressing formal charges against Defendant Prohaska by signing a Cook County Sheriff's Police report and making a formal recorded statement regarding the threat made by Defendant Prohaska. At this meeting, Plaintiff Gackowski was prohibited from pressing formal charges or making a formal recorded statement.

51. Fearing for their lives, beginning January 11, 2003, Plaintiffs Fairley and Gackowski used the remainder of his sick time and days off and did not report to work until he resigned.

52. On January 15, 2003, Fairley, with the assistance of private counsel, prepared a written statement regarding the event he witnessed during the SI-2 Incident. Also on that day, Fairley and his counsel met with counsel for the defendants in the *Fields* litigation. After the close of business that same day, the Sheriff's Inspector General, Henry Barsch, conducted the first interview regarding the SI-2 Incident which had taken place 2 ½ years earlier.

53. On January 17, 2003, Fairley began his deposition testimony in the *Fields* litigation. During the course of his deposition, he testified about, among other things, the Cruz and Ortiz incidents, the Fernandez incident, the July 29 incident in SI-2, and the Alpacino Lewis incident. He also indicated that he had shared all this information with Plaintiff Gackowski.

54. On January 30, 2003, plaintiffs' counsel in the *Fields* litigation sent out notice for the deposition of Plaintiff Gackowski. At his deposition on February 18, 2003, Gackowski testified about multiple instances of the excessive use of force he had witnessed in Divisions Five and One.

Plaintiffs Resign as a Result of Defendants' Ongoing Campaign of Harassment.

55. As a result of the Defendants' harassment campaign in an attempt to silence Plaintiff Fairley, in

Fall 2002, Plaintiff Fairley suffered from chest pains and was hospitalized and diagnosed with acute stress. Plaintiff Fairley's severe stress not only resulted in chest pains and hospitalization, but also loss of sleep, loss of appetite, weight loss, exhaustion, and repeated headaches.

56. As a result of the Defendants' harassment campaign in an attempt to silence Plaintiff Gackowski, he has experienced severe stress resulting in sleep deprivation and repeated headaches.

57. On the morning of February 3, 2003, Plaintiffs Fairley and Gackowski, with their attorney, arrived at the IAD Office in Division Five and filed written emergency transfer requests. Plaintiffs spoke to IAD Chief Diaz, who assured them that he would immediately deliver the requests to Acting Executive Director John Maul. Diaz also assured Plaintiffs that they would have a response from Acting Executive Director Maul no later than the close of business on February 3, 2003.

58. Neither Acting Executive Director Maul, nor any other representative of the CCDOC, contacted the Plaintiffs on February 3 or 4, 2003 regarding their emergency transfer requests. Seeking a response regarding their emergency transfer requests, Plaintiffs Fairley and Gackowski went to Diaz's office in the late afternoon of February 4, 2003. They were told by Diaz that their emergency transfer requests had not been given to Maul, but were instead diverted to the Legal Office at CCDOC. Because their emergency transfer requests had not been granted and in fear of their safety, Plaintiffs Fairley and Gackowski were compelled to submit their resignations.

Legal Claims

Count I: Deprivation of First Amendment Rights Under § 1983 (PRIOR RESTRAINT)

59. Paragraphs 1-58 are hereby restated and re-alleged as paragraphs 1-58 of CountOne.

60. Plaintiffs Fairley and Gackowski had a right pursuant to the First and Fourteenth Amendments of the United States Constitution to testify truthfully about the use of excessive force at the Cook County Jail.

61. The Defendants, acting under color of state law and without legitimate justification, intentionally engaged in a campaign of harassment deliberately aimed at silencing the Plaintiffs and discouraging them from testifying.

62. Through this campaign of harassment, Plaintiffs were chilled from speaking out on matters of public concern in violation of their First and Fourteenth Amendment rights, and were put in fear for their lives and physical safety to the point of their constructive discharge.

WHEREFORE, Plaintiffs request the following relief:

a) Judgment for compensatory damages, and for Plaintiff Gackowski only back pay, jointly and severally against the Defendants;

b) Judgment for punitive or exemplary damages, against each of the Defendants in their individual capacities;

c) Under 42 U.S.C. § 1988, an award of the costs of this action, including reasonable attorneys' fees, jointly and severally against the Defendants; and

d) Such other and further relief that to this Court may seem just and equitable.

Count II: Indemnification
(Against the Sheriff of Cook County and Cook County)

63. Paragraphs 1-62 are hereby re-alleged as paragraphs 1-62 of Count Two.

64. Pursuant to a stipulation entered herein by Defendant Sheriff, and on order of court entered on September 24, 2007, Defendant Sheriff of Cook County is liable for any judgment entered against the Defendants for compensatory damages and for the associated attorneys' fees and costs.

65. Pursuant to 745 ILCS 10/9-102, 55 ILCS 5/4-6003 and 55 ILCS 5/5-1106, Defendant Cook County is empowered and directed to pay any tort judgment for compensatory damages (and associated attorneys' fees and costs) for which an independently elected Cook County officer such as Defendant Sheriff of Cook County or his deputies acting within the scope of their employment is found liable. Defendant Cook County is liable for any judgment entered against the individual Defendants and Defendant Sheriff of Cook

County for compensatory damages and for the associated attorneys' fees and costs. The acts of the Defendants in Count I were committed within the scope of their employment. In the event a judgment for compensatory damages is entered against the Defendants, Defendant Cook County must pay the judgment, as well as the associated attorneys' fees and costs.

WHEREFORE, Plaintiffs request the following relief: Judgment jointly and severally against the Sheriff of Cook County and pursuant to 745 ILCS 10/9-102, 55 ILCS 5/4-6003 and 55 ILCS 5/5-1106 against Defendant Cook County; and such other and further relief that to this Court may seem just and equitable.

Jury Trial Demanded

Plaintiffs demand a trial by jury.

Dated: February 22, 2010

Respectfully submitted,

/s/ Matthew J. Piers
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APPENDIX 2

(Rev. 7/23/01) CCL 0065 NO. 1002

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
LAW RECORD
DOROTHY BROWN
CLERK

JUDGE IRWIN SOLGANICK #239 JUNE 3, 2005

00L9339
01L9023
02L14917

NATHSON FIELDS, ET.AL.
vs.
EDWARD BYRNE, ET. AL.

VERDICT FORM B

We, the jury find for all of the DEFENDANTS and against all the plaintiffs.

Judgment entered on the Verdict.

Microfilm #000501101